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MASSACHUSETTS REPORTS

210

CASES ARGUED AND DETERMINED

Massachusetts IN THE
SUPREME JUDICIAL COURT *7*
OF
MASSACHUSETTS

SEPTEMBER 1911—JANUARY 1912

HENRY WALTON SWIFT

REPORTER

BOSTON
LITTLE, BROWN, AND COMPANY.

1912

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JUSTICES
OF THE
SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS.

HON. MARCUS PERRIN KNOWLTON, CHIEF JUSTICE.

(Resigned September 7, 1911.)

HON. ARTHUR PRENTICE RUGG, CHIEF JUSTICE.

(Appointed September 13, 1911.)

HON. JAMES MADISON MORTON.

HON. JOHN WILKES HAMMOND.

HON. WILLIAM CALEB LORING.

HON. HENRY KING BRALEY.

HON. HENRY NEWTON SHELDON.

HON. CHARLES AMBROSE DECOURCY.

(Appointed September 20, 1911.)

ATTORNEY GENERAL

HON. JAMES MARCUS SWIFT.

CORRECTION OF ERRORS IN VOLUME 205 MASS.

In the case of *Cheney v. Assessors of Dover*, 205 Mass. 501, the third head-note, which begins on the last line of page 501, should be stricken out. On page 503 in the tenth line from the bottom the word "no" should be inserted between the word "that" and the words "such service."—REPORTER.

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CASES
ARGUED AND DETERMINED
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

BENJAMIN JOHNSON *vs.* E. FREDERICK CARR.

Norfolk. March 27, 28, 1911. — September 6, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Practice, Civil, Service on non-residents and absent defendants, Motion to dismiss, Abatement. *Attachment*, Of real estate of absent or non-resident defendant. *Judgment*, Special.

A writ in an action of contract described the defendant as of a certain city in a certain county in this Commonwealth. The officer's return stated that he had attached all the right, title and interest of the defendant in and to real estate in the county aforesaid, that he had made diligent search for the defendant "and for his last and usual place of abode, tenant, agent and attorney, but have been unable to find either within my precinct and could make no service of this writ upon him." *Held*, that this was not a return that the defendant had no last and usual place of abode within the precinct of the officer but only that no such abode was known to the officer, and therefore that it did not show that the defendant was a non-resident, within the meaning of R. L. c. 170, § 5, requiring, that, where real property of a non-resident is attached and no personal service is made upon the defendant, notice shall be given within one year after the entry of the action, as distinguished from a defendant merely absent from the Commonwealth, in whose case under the provisions of § 6 of the same chapter the matter of notice is discretionary with the court.

Although, upon a motion to dismiss, only the record before the court is considered, in the present case, on account of the assumption of the parties in the argument, "the record" was treated as including besides the record of the case itself the record of certain material proceedings in the Probate Court which had been before the court to which the motion to dismiss was addressed.

A decree of the Probate Court under R. L. c. 144, appointing a receiver of the property of a certain person on the ground that such person had disappeared from the Commonwealth and that his whereabouts were unknown, does not

show necessarily that the absentee has become a non-resident of the Commonwealth within the meaning of R. L. c. 170, § 5, requiring in an action in which real property of such non-resident is attached and no personal service is made upon the defendant that notice shall be given within one year after the entry of the action, and such absentee may be a defendant merely absent from the Commonwealth, in which case under the provisions of § 6 of the same chapter the matter of notice is discretionary with the court.

Under the provision of R. L. c. 170, § 5, that, "if real property of a non-resident is attached and no personal service is made upon the defendant, the action shall be dismissed unless notice thereof is given in such manner as the court orders within one year after the entry of the action," the failure to give such notice is matter of abatement and must be pleaded in abatement and not in bar.

Under the provision of R. L. c. 170, § 5, that, "if real property of a non-resident is attached and no personal service is made upon the defendant, the action shall be dismissed unless notice thereof is given in such manner as the court orders within one year after the entry of the action," the denial of a motion to dismiss such an action for want of such notice on the ground that it did not appear by the record that the defendant was a non-resident, being a decision made on the facts appearing of record, is not conclusive upon the parties as to the actual facts, and does not prevent the defendant from pleading in abatement the failure of the plaintiff to give the notice and the fact that the defendant was a non-resident and from proving that fact.

Where, in an action of contract, real estate of a non-resident defendant was attached and no personal service was made on the defendant, and, although no notice was given within one year as required by R. L. c. 170, § 5, the defendant, appearing specially by the receiver of his property appointed under R. L. c. 144, waived this defense by answering in bar without pleading it in abatement and it was held that the plaintiff was entitled to judgment, this court refrained from intimating whether the judgment should be general or whether it should be special, affecting only the property attached, leaving that question to be dealt with if it should arise at a later stage of the case.

CONTRACT, with two counts, the first on a promissory note for \$300 dated January 1, 1895, and payable four months after date, and the second on an account annexed for the price of merchandise sold and delivered up to February 25, 1895, amounting to \$91.86. Writ in the District Court of East Norfolk dated March 19, 1908.

On appeal to the Superior Court the case was heard by *Pierce, J.*, upon a motion to dismiss made in behalf of the defendant by the receiver of the property of the defendant, who was appointed by the Probate Court for the county of Norfolk on July 26, 1905, under R. L. c. 144, on the ground that the defendant had disappeared from the Commonwealth on August 10, 1898, and that his whereabouts were unknown. The facts which appeared by the record before the judge are described in the opinion.

The defendant made six requests for rulings, which, with the judge's action upon each, were as follows :

1. That on the record the defendant was a non-resident at the time of the attachment of the defendant's real property.

"I find upon the record that the defendant was not a non-resident."

2. That on the record no personal service was made on the defendant.

"I so find."

3. That on the record no notice whatever of the action was given in any way within a year after the entry of the action.

"I so find."

4. That on the record the order of the court of April 7, 1904, ordering notice by publication in the Quincy Patriot was never complied with.

"I so find."

5. That on the evidence of the record as a matter of law the court has now no jurisdiction of the action and the action should be dismissed.

"I refuse to so find."

6. That, the order of the court as to the notice to be given not having been complied with, and more than a year having elapsed since the entry of the action, the court as a matter of law has lost jurisdiction of the action and it could not be continued for further notice of service.

"In my opinion it does not appear from the record that the defendant was at the time of this attachment a non-resident as distinguished from an absent defendant. I refuse to give the request."

The judge made an order denying the motion to dismiss, and the defendant appealed.

To the refusal of the judge to make the first, fifth and sixth rulings requested as above the defendant alleged exceptions.

Later the case was heard by *Hitchcock, J.*, without a jury, upon the issues raised by the defendant's answer in bar, which had been filed by the receiver before his motion to dismiss.

The plaintiff asked the judge to make the following rulings :

"1. The defendant left this Commonwealth after the cause of action accrued, to wit, on or about the tenth day of August, 1898, and has never returned.

"2. Since on or about the tenth day of August, 1898, the defendant Carr has 'resided out of the Commonwealth' within the meaning of R. L. c. 202, § 9.

"3. As the defendant Carr resided out of the Commonwealth after this cause of action accrued, the time of such residence out of the Commonwealth must be excluded in determining the time limited for the commencement of this action, and therefore this action was seasonably commenced."

The judge found the first ruling as a fact, and adopted the second and third.

The defendant asked the judge to make the following rulings:

"1. That, on the record, as matter of law, the defendant is not in court, no proper service ever having been made upon him, as provided by R. L. c. 170, and this action cannot be maintained.

"2. That, on the record, as matter of law, no personal service ever having been made upon the defendant and no service by publication having been made upon him as ordered by the District Court of East Norfolk, this action cannot be maintained.

"3. That, on the record, as matter of law, no personal service, or service by publication as ordered by the District Court of East Norfolk, having been had on the defendant, and more than two years after the date of the writ a receiver having been appointed for the defendant under R. L. c. 144, as amended by the St. 1908, c. 241, the plaintiff's claim cannot be adjudicated in this court.

"4. That the judge of the Superior Court, on the hearing October 27, 1909, on the defendant's motion to dismiss having found that the defendant was not a non-resident, the statute of limitations runs against the plaintiff's claim, and this action cannot be maintained.

"5. That, the burden of proof being upon the plaintiff to show both a cause of action and the suing out of process within the period of limitation, the plaintiff cannot maintain his action unless he shows such an absence of the defendant from the State as to work a change of domicile.

"6. If the plaintiff shall show such an absence of the defendant from the State as to work a change of domicile, then the action cannot be maintained under [R. L.] c. 170, § 5.

"7. If the plaintiff shall fail to show such an absence of the

defendant from the State as to work a change of domicile, then the statute of limitations is a bar, and the action cannot be maintained."

The trial judge adopted the fifth and seventh rulings requested by the defendant as above, and refused to make the first, second, third, fourth and sixth rulings thus requested.

The judge found for the plaintiff and assessed damages in the sum of \$576 on the first count and the sum of \$176.67 on the second count, making in all the sum of \$752.67, including interest computed to September 1, 1910. The defendant alleged exceptions.

S. W. Mendum, for the defendant.

G. W. Abele, for the plaintiff.

HAMMOND, J. 1. As to the motion to dismiss. At the hearing on this motion the only evidence was the record. The judge refused to grant certain rulings requested by the defendant and overruled the motion. This part of the case is before us upon the defendant's exceptions to this refusal and on his appeal from the order overruling the motion.

The exceptions raise the question whether upon the record it appears that at the time of the attachment the defendant was a non-resident as distinguished from an absent defendant. If he was a non-resident, then, inasmuch as no personal service was made upon him and no notice whatever was given to him within one year of the entry of the action, the action should have been dismissed. R. L. c. 170, § 5. If, however, the defendant was merely an absent defendant as distinguished from a non-resident, then whether the action should be dismissed was within the discretion of the court. R. L. c. 170, § 6.

In the writ which issued from the District Court of East Norfolk, the plaintiff was described as of "Quincy in said county of Norfolk," and the defendant as "of said Quincy." The officer's return states that he attached all the right, title and interest of the defendant in and to real estate in the county aforesaid, and further that he made diligent search for the defendant "and for his last and usual place of abode, tenant, agent and attorney, but have been unable to find either within my precinct and could make no further service of this writ upon him." This falls far short of saying that the defendant was a

non-resident or of conclusively showing that he was. It is the ordinary return of an officer that he cannot find the defendant or his last and usual place of abode, or any tenant or agent of his. It is not a return that the defendant has no last and usual place of abode within the precinct of the officer, but only that no such abode is known to the officer. Beyond this his return cannot go. *Tilden v. Johnson*, 6 Cush. 854.

We are in doubt whether the statement in the bill of exceptions that "the only evidence before the court was the record" means that the evidence was confined to the record of the case itself, or whether it included also the evidence of the proceedings of the Probate Court appointing a receiver. The parties having argued the case upon the latter theory, however, we shall consider the case in the same way; although it is to be noted that on a motion to dismiss only the record before the court is considered. Without reciting in detail the allegations of the petition for a receiver and the language of the order appointing him, it is sufficient to say that they are all perfectly consistent with the view that the absentee was still a resident of this Commonwealth. Nor can the recital in the order of notice of the District Court for further service that "the defendant was not an inhabitant of this Commonwealth" be conclusive. It seems to be based entirely upon the suggestion of the plaintiff and an inspection of the officer's return, which of themselves are not sufficient to require such a finding.

Upon a careful inspection of the whole record the refusal to rule as matter of law that the defendant was a non-resident at the time of the attachment was correct and the rulings requested which were based upon the theory that he was a non-resident were properly refused. On this part of the case the exceptions are overruled and the order of the judge upon the motion to dismiss is affirmed.

2. As to the exceptions taken during the trial on the merits. These exceptions arise upon the refusal of the judge to make certain rulings and upon certain rulings actually made. The case was tried before a judge sitting without a jury. One ground of defense appears to have been the statute of limitations. By reference to the first bill of exceptions "which may be referred to for a fuller statement of the case," it appears that

the causes of action set forth in the two counts of the declaration occurred, the first in February, 1895, and the second in May, 1895. The writ was dated March 19, 1903, more than six years after the respective causes of action had accrued. Under these circumstances the judge ruled in substance that as to each count the burden of proof was upon the plaintiff to prove the cause of action, and that the writ issued within the "period of limitation," and that if he failed to show such an absence of the defendant from the Commonwealth as worked a change of domicile, then the statute of limitations would be a bar and the action could not be maintained. He further found as a fact that the defendant left this Commonwealth on or about August 10, 1898, and never has returned. Having so ruled and found, the judge found for the plaintiff. The finding necessarily implies that the time during which the defendant was actually domiciled out of the Commonwealth is the only time which did not run against the plaintiff, or, in other words, deducting from the time between the accruing of the respective causes of action and the date of the writ, the time during which the defendant was domiciled out of the Commonwealth, there must have been less than six years. The record does not state that all the evidence is therein reported, and hence we cannot know whether it warranted such a finding. We do not understand, however, that the defendant contends that the finding was not warranted.

The defendant's complaint is that if his domicile was changed as found by the judge, then the judge should have given his sixth request, which was as follows: "If the plaintiff shall show such an absence of the defendant from the State as to work a change of domicile, then the action cannot be maintained under [R. L.] c. 170, § 5." But the answer is that no such question was before the court. The defendant had attempted to raise that question on his motion to dismiss, which, being decided only upon the facts appearing of record, was disallowed. Even if the domicile had been changed, it does not follow that the plaintiff has no cause of action but simply that the present writ should be abated. This defense should be pleaded in abatement and not in bar. But it was not pleaded in abatement. The case therefore had gone beyond the stage where the question was material. Nor was the finding made upon the motion to dismiss con-

clusive. It was a decision made on the facts appearing of record, and was not conclusive upon the parties as to the actual facts. Notwithstanding the motion to dismiss was denied, a plea in abatement could have been filed and the facts shown. The first, second, third, fourth and sixth requests were properly refused.

Upon the findings of the judge under the fifth and seventh rulings adopted by him, the second and third rulings requested by the plaintiff and refused by the judge could not have prejudiced the defendant.

The result is that both bills of exceptions must be overruled. But as there seems to have been no service upon the defendant we do not mean to intimate whether the judgment should be general, or whether it should be special affecting only the property attached. That question may arise at a later stage of the case.

Exceptions overruled.

JOHN HETHERINGTON AND SONS, Limited, vs. WILLIAM
FIRTH COMPANY.

Suffolk. March 28, 1911. — September 6, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Practice, Civil, Hearing by judge without jury, Conduct of trial: requests and rulings, Exceptions. *Contract*, Modification, Cancellation, Performance and breach, Construction. *Statute of Frauds*. *Evidence*, Presumptions and burden of proof. *Damages*, In actions of contract, Prospective profits.

From a bill of exceptions taken by a defendant to the rulings of a judge at the hearing of an action at law without a jury it appeared that at the close of the evidence the defendant presented to the judge in writing nineteen requests for rulings, several of which contained assumptions of fact, and that the judge made a general finding for the plaintiff but did not file any memorandum as to facts found by him. As to his disposition of the requests, the bill of exceptions stated that "these requests, though not expressly passed on by the court, are to be treated as refused, the defendant having duly reserved its exceptions, it being understood, however, that the facts assumed or hypothetically stated in these requests are to be taken as true only in so far as sustained by the evidence herein contained and referred to." *Held*, that the passage quoted above must be taken to mean that the requests were refused, and that, if on any view of the evidence reported the facts assumed in the requests could have been found, such facts were to be treated as so found.

Where, at the hearing of an action at law by a judge without a jury, at the close of the evidence a ruling is asked for such as should have been given if the trial had

been before a jury, an exception to a refusal to give it must be sustained unless the ground of refusal is distinctly stated or plainly appears in some way on the record and is such that no harm is done by the refusal, or unless it is obvious on the whole record that no rights of the parties have been endangered.

A judge, hearing an action at law without a jury, in refusing a request for a ruling founded upon evidence is required to state expressly or by fair inference either that the legal proposition presented is unsound or inapplicable, or that the facts upon which it is predicated are not found to be true.

A merchant in Boston previous to March of a certain year had dealt with a manufacturing corporation in England under a contract in writing by which on certain terms he sold goods of the manufacturing corporation of a certain kind and no one else's goods of that description. The merchant in March incorporated his business and the two corporations then made a contract under seal for a period of five years which was intended to be on the same terms as that which formerly had existed between the manufacturing corporation and the merchant. Two months later, it having been discovered that the terms expressed in the contract between the corporations were not as intended, the parties agreed by correspondence that the contract of March should be treated as though it expressed the terms as they were intended to be. In July the merchant was in England and asked to have the March agreement "corrected" to state the intention of the parties. The board of directors of the manufacturing corporation voted to "cancel" the March agreement and to issue in substitution therefor a new agreement to accord with what the parties intended. Thereafter the two copies of the March agreement were torn into small pieces by the secretary of the manufacturing corporation and mailed to the merchant with a letter stating, "The old agreements which I think are sufficiently cancelled are enclosed herewith." The new drafts of agreements, executed by the manufacturing corporation, were sent to the Boston office of the merchant corporation for execution by it, and were returned by its resident treasurer with a suggestion as to a further and entirely new alteration. Nothing further was done about the execution of the new contract until, in August, the merchant corporation refused further to sell the goods of the manufacturing corporation. At the hearing by a judge without a jury of an action by the manufacturing corporation against the merchant corporation for breach of the March contract the foregoing facts appeared and there was evidence tending to show that the merchant was present at the meeting of the manufacturing corporation when the vote cancelling the March contract was passed, that the secretary of the manufacturing corporation, when he tore up the March contracts and sent them to the merchant, did so to calm an apprehension of the merchant that so long as the original paper was in existence there was a possibility that he might be bound by its erroneous terms, that the merchant never had asked to have the March contract cancelled or annulled, that to the minds of the officers of the manufacturing corporation it was "still running" in August, and that during July and August the merchant corporation was dealing with the manufacturing corporation as though the March contract, as modified by the correspondence, was in force. The judge found for the plaintiff. *Held*, that the defense of the statute of frauds, based on the fact that the contract was modified by a proposition in writing by the defendant assented to only orally by the plaintiff, could not be sustained; that the evidence warranted a finding that the contract was not annulled by mutual consent, the mutilation of the contract by the plaintiff being only one factor, not in itself conclusive, to be considered on that issue; and that a finding for the plaintiff was warranted.

In an action of contract where the plaintiff makes a claim for damages to his business resulting from a breach of contract by the defendant, he may recover prospective profits as damages where loss of profits is the proximate result of the breach such as in the common course of events reasonably might have been expected, at the time the contract was made, to ensue from a breach, and where it can be determined as a practical matter with a fair degree of certainty what the profits would have been; but profits cannot be recovered when the contract, interpreted in the light of all its surroundings, does not appear to have been made in contemplation of such damages or when they are remote or so uncertain, contingent, or speculative as not to be susceptible of trustworthy proof. They must be capable of ascertainment by reference to some definite standard, either of market value, established experience or direct inference from known circumstances. In the present case it was *held* that the terms of the contract showed that loss of profits was not contemplated by the parties when the contract was made as a measure of damages that might result from a breach; and that all the circumstances, both before and after the execution of the contract, furnished a basis too insubstantial for the ascertainment of profits lost by the plaintiff.

An English manufacturer of machinery of a certain description made with a Boston merchant a contract under seal, which, reciting that it was proposed to continue an agreement theretofore existing between the manufacturer and a predecessor of the merchant and "to vest" that contract in the merchant, provided that the manufacturer gave to the merchant the sole right to sell his machinery in the United States and Canada, and the merchant undertook to sell efficiently and to appoint representatives to travel regularly in those countries for the purpose of procuring orders for the manufacturer's goods; that the merchant during the continuance of the agreement should not be engaged or interested within the territory mentioned in the sale of any other goods of that description and that the manufacturer should do all his business in that territory through the agency of the merchant, referring to it all inquiries for that territory; that all goods should be invoiced as delivered and a statement rendered to the merchant at the beginning of the following month and paid by him in sixty days, and that "by virtue of these terms of payment" the merchant should have the right to and should conduct all business in his own name; that the agreement should remain in force for five years except that, in the event that it was found that the merchant could not work the business as efficiently as his predecessor had, the manufacturer might terminate it on six months' notice. The merchant unjustifiably refused, after performance for six months, to perform further. In an action by the manufacturer for breach of the contract, it was *held* that the contract had a double aspect, since in one essential respect it created the relation of principal and agent and in another view it contemplated as between the parties purchases and sales; that, while under the circumstances of the case and because of the nature of the contract the plaintiff could not recover for loss of profits under that aspect of the contract that contemplated purchases and sales, substantial damages might be recovered for breach of the contract in its agency aspect due to the expense cast up by the plaintiff in establishing like relations with a new agency and in regaining the position which he had acquired under the contract with the defendant and had lost by his unjustifiable act.

CONTRACT for breach of a contract in writing, dated March 7, 1900, and to continue for five years, which established terms

under which the defendant alone should sell exclusively certain machinery of the plaintiff in the United States and Canada, and which was alleged to have been modified by an offer of the plaintiff in writing accepted by the defendant orally as hereinafter described, the breach of the contract relied on being that in August, 1900, the defendant ceased to sell machinery of the plaintiff and began selling that of another manufacturer. Writ dated November 15, 1901.

The case was referred to James D. Colt, Esquire, as auditor. He filed a report in which he found for the defendant, giving as his reasons in substance that the original contract between the parties was formally cancelled and that no new contract or agreement ever was made to take its place.

In the Superior Court the case was heard by *Raymond, J.*, without a jury. The auditor's report was introduced in evidence by the defendant, and much other evidence which was not before the auditor was introduced by both parties.

It appeared that previous to March 7, 1900, one William Firth of Boston had been selling textile machinery, of which the plaintiff was a manufacturer in England on a large scale, under a contract with the plaintiff; that, Firth having formed the defendant corporation to which he had transferred his business and of which he owned almost all of the capital stock, the plaintiff and the defendant made the following contract under seal as of the date of March 7, 1900:

"Whereas it is proposed to continue the Agreement hitherto existing between John Hetherington and Sons Ltd and William Firth Esq of Boston aforesaid and to vest the same in a new company entitled the William Firth Company.

"It is hereby mutually agreed that the said John Hetherington & Sons Ltd give the said William Firth Company the sole right to sell their machinery in the United States of America and the Dominion of Canada and the William Firth Company undertakes to sell efficiently and to appoint representatives to travel regularly in those countries visiting the existing mills and districts in which mills may be erected for the purpose of procuring orders for all the various machines made by the said John Hetherington and Sons Ltd.

"That the William Firth Company shall not during the con-

tinuance of this agreement be engaged or interested in the sale in the United States of America or the Dominion of Canada of any other spinning machinery similar to or made and used for the same purpose as the spinning machinery made by John Hetherington & Sons Ltd. That John Hetherington & Sons Ltd shall do all business with the United States of America and the Dominion of Canada through the agency of the William Firth Company referring to them all enquiries they know are for those countries.

"That all machinery shall be invoiced as delivered and a statement of such deliveries made during the month shall be rendered by the first available mail in the following month and paid by the said William Firth Company at the end of that month by virtue of these terms of payment the William Firth Company shall have the right to and shall conduct all business in their own name.

"That this agreement shall remain in force for a period of five years from the date thereof and shall at the expiration of that time be determined or continued by six months previous notice given by either of the parties thereto Provided always that in the event of it being found that the William Firth Company cannot work the business as efficiently as it has been worked by William Firth John Hetherington & Sons Ltd shall have the right to terminate this agreement by six months notice to be given at any time."

Early in the following May it came to the attention of the defendant that the terms of payment in the above contract were not the same as those of the contract between the plaintiff and Firth, in which it had been agreed that all accounts made up on the thirty-first of each month should be paid in sixty days or Firth should pay interest at five per cent. After some correspondence between the parties in May, the defendant stipulated in all inquiries as to prices during the rest of that month that payment should be sixty days from the date of shipment, and all offers accepted by the plaintiff during that month were accepted on that basis. On June 2 the defendant wrote the plaintiff saying: "What we meant by payable on shipment two months was payable two months from invoice date. To save expense in future quotations we ask you for, please understand that all our inquiries are on this same basis, that payment shall be made two months from date of invoice unless special terms are made, and trust

this will meet with your approval." This was acquiesced in and acted on by the plaintiff and all accounts were rendered and settled on that basis up to August 22.

In the latter part of May Firth went to England and while there urged that the contract of March 7 be corrected. On June 25, being still in England, he wrote to the secretary of the plaintiff, "Will you have the agreement changed from 80 days to 60 days and signed? Send direct to Boston. I think changing date and initialing the same will be all that is required."

There was a meeting of the plaintiff's board of directors on July 2. There was conflicting evidence as to whether Firth was present. The records of the meeting stated that he was present, and contained the following vote: "Agreement with William Firth Co., the clause relating to payment in the agreement dated the 7th of March 1900 between this company and the William Firth Company was found not to be in accordance with our former practice with William Firth, and it was moved by Messrs. J. Hetherington seconded by E. P. Hetherington, and Resolved that the agreement between this company and the William Firth Company signed and sealed on the 7th of March 1900, be and is hereby cancelled and in substitution thereof a new agreement, the terms of which have been read to the meeting, be signed by any two directors and the secretary of the company and sealed with the Company's seal." There was evidence tending to show that some one at the meeting had suggested that it would be sufficient to make the change in the existing agreements and to initial the change, but that the chairman said he already had told the secretary to draw fresh copies; that these copies were dated March 7, 1900, and were exactly like the copies of the agreement already in existence except that in place of the words "at the end of the month after the month of delivery in Liverpool" were put "at the end of the second month after the month of delivery in Liverpool"; that these copies were read to the meeting in the presence of Firth and Firth was asked by the chairman if the agreement as altered and read over was satisfactory to him and that he said it was, and that then the resolution as contained in the records was passed and the amended copies were executed by two directors of the plaintiff and the seal of the plaintiff was affixed; that Firth then was asked to sign them, and he said "You had better

send them on to Boston and our people will execute it in the proper manner." The secretary of the plaintiff then asked the chairman whether he had not better mark the two old copies with the word "Cancelled" or something of that kind and the chairman said "Oh, no. Mr. Firth has approved of the new ones. Tear them up," and that he tore both copies in two, Firth being present during the whole proceeding. The plaintiff's secretary further testified that after the meeting adjourned he took the torn pieces of the original copies and tore them into small fragments and enclosed them to Firth at Blackpool in a letter as follows: "Dear Sir: The old agreements which I think are sufficiently cancelled are enclosed herewith"; and that his reason for tearing up these fragments and writing the letter returning them to Firth was to calm apprehensions that Firth had expressed that so long as the original paper was in existence there was a possibility that he might be called upon to pay in accordance with its terms.

The day following the meeting of the plaintiff's board of directors the re-drafted contracts were sent to the defendant's Boston office, and in the course of the mails the defendant's treasurer returned them with a suggested further alteration to the effect that the defendant should have the option of giving notice and terminating the contract in case the quality of machinery furnished by the plaintiff and the times of their deliveries were such as to injure the defendant. Action on the subject by the plaintiff's board of directors was delayed pending the absence of the chairman and the defendant was notified to that effect. No further action was taken by the plaintiff and no further communications were sent to the defendant with regard to the contract. The re-drafted contracts never were executed by the defendant.

There was evidence that Firth never had asked to have the contract cancelled or annulled, that to the minds of the plaintiff's officers the contract was "still running" in August, 1900, that between July 2 and August 22 the defendant was carrying on business in America as before as representative of the plaintiff, taking fresh orders for the plaintiff's machinery, giving fresh orders to the plaintiff and corresponding with the plaintiff with regard to future business, without any reference to any amendment, cancellation, or change in the relations existing under

the contract of March 7 other than the change in the time of payment.

There was evidence that in June and July, 1900, the plaintiff was short of working capital owing to the fact that it had made large sales on long credit; that during the previous four years it had lost some £125,000, that it had an arrangement with its bankers by which it was allowed a drawing credit of between £80,000 and £90,000, for which security was given, and that drafts against this credit during the spring and summer of 1900 were currently between £70,000 and £76,000; but there was evidence that it was not insolvent; that most of the losses above referred to had occurred during the early part of the four year period and had resulted in part from a strike; that Firth after his arrival in England had informed himself as to the condition of the plaintiff and had conferred with its officers in regard to its financial needs, and that on July 16 at a meeting at which Firth was present a long discussion took place as to the best course to be taken by the company in its then condition, the questions of voluntary liquidation, raising of new capital and amalgamation with another firm or firms in the same business were discussed and ultimately the plaintiff's auditor was requested to approach some firm or firms in the machinery trade and sound them as to whether they would be willing to take over the business at a price to be arranged; that the suggestion of liquidation was made by Firth and was not approved by any others present, and that the auditor of the company said there was absolutely no necessity for anything of the kind; that at this meeting Firth himself suggested approaching Howard and Bullough, competitors, that the plaintiff's officers never intended selling out the plaintiff's plant or business; that representatives of two of three other firms were sounded as to possible amalgamation or taking over of the plaintiff's business, but that these inquiries had been ended by August 22 and had come to nothing; that from July on there were various plans under discussion for reorganization or getting new capital but that no new capital was in fact procured; that the company continued its business successfully and increased it; that the production of the company and its deliveries of its products during the summer of 1900 were in excess of all previous times and that its production

and shipment during the year 1900 were the greatest in its history up to that time; that the company did not in fact amalgamate with or sell out its business to any other company but successfully continued its business without interruption; that at no time was it pressed by any of its creditors or threatened with any proceedings by them.

Other facts are stated in the opinion.

The defendant made nineteen requests for rulings, the substance of all of which, except those numbered sixteen, seventeen, eighteen and nineteen, sufficiently appears from the opinion. The requests so numbered were as follows:

"16. Since no prices are fixed by the contract of March 7, 1900, at which machinery was to be sold by the plaintiff to the defendant corporation, but those prices were left to be fixed from sale to sale by agreement of the parties, no damages can be assessed based upon the profit which the plaintiff would have made upon any given amount of sales.

"17. The contract having provided no standard of prices at which sales were to be made by the plaintiff to the defendant during the five years from March 7, 1900, and those prices having been left entirely to the agreement of the parties from time to time, the plaintiff cannot recover even for such sum as the court may think the plaintiff and the defendant would have agreed upon, and any such standard is too vague and indefinite for legal ascertainment.

"18. If the court finds that the sale of English machinery was seriously interfered with during the five years from March 7, 1900, as the result of American competition, and that prices of the various machines fell heavily during that period, then the court cannot determine how much the defendant would probably have agreed to pay the plaintiff on such sales as it thinks the defendant would have been able to make.

"19. The fact that the contract established no scale of prices; that the prices were very much reduced for the five years from March 7, 1900, below those of the previous five years; that the defendant corporation, and not William Firth, was making the sales; that several kinds of machinery were entirely driven out of the market by American competition and prices, rendered the plaintiff's damages, if any, too problematical for ascertainment."

The action of the presiding judge as to the requests for rulings is described in the opinion. There was a finding for the plaintiff for \$59,500; and the defendant alleged exceptions.

S. J. Elder, (F. E. Bradbury with him,) for the defendant.

J. B. Warner, (H. James, Jr., with him,) for the plaintiff.

RUGG, J. 1. A question of practice as to trials at law before a judge sitting without a jury lies at the threshold. The defendant seasonably presented requests for rulings. It is said in the exceptions that "these requests though not expressly passed on by the court are to be treated as refused, the defendant having duly reserved its exceptions, it being understood, however, that the facts assumed or hypothetically stated in these requests are to be taken as true only in so far as sustained by the evidence herein contained and referred to." We interpret this as meaning that the requests were refused. If the court ignored them the defendant's rights can be no higher than if the court refused them. It means further that if on any view of the evidence reported, the facts assumed in the requests can be found, then the facts are to be treated as so found. We are led to this construction of the exceptions because it is the only one which is fair to the excepting party. Otherwise it could not be determined what the view of the Superior Court was as to the matters covered by the prayers. The Superior Court judge filed no memorandum and made only a general finding for the plaintiff. One branch of the plaintiff's argument has been that the exceptions must be overruled on the ground that it must be assumed that the judge did not find the facts recited in the prayers and that so far as bald requests for correct rulings of law have been refused it must be assumed that facts have been found by the judge which made inapplicable such principles. While a case may be imagined where such an argument may prevail, it cannot ordinarily, nor in this case. When controverted issues of fact are tried without a jury, before a judge who makes only a general finding, it would be manifestly unjust if the defeated party could not be assured in some way that correct rules of law have been followed. Where the facts are not agreed and no memorandum of findings is filed, commonly it cannot be certain precisely what facts are found or which witnesses are believed by the trial judge in reaching his conclusions. If it

were necessary for an excepting party not only to maintain the soundness of the law as stated in his requests but also to show that the facts supposed as the groundwork of his request must have been found on the evidence, and that no other facts could have been found which would make inapplicable the ruling of law asked for, parties in jury waived cases could not know, save in comparatively rare instances, that a grievous error of law had not been committed by the trial judge. When a case is tried without a jury, the judge occupies a dual position; he is the magistrate required to lay down correctly the guiding principle of law; he is also the tribunal compelled to determine what the facts are. When these duties are nicely analyzed, he ought as judge to formulate the governing rules of law, and then, acting in place of the jury, he ought to follow these rules in deciding where the truth lies on conflicting evidence. In one essential particular only does he stand differently as to requests for rulings from a judge presiding over a jury trial,—he may refuse to grant a request for the avowed reason that it is immaterial or inapplicable in view of the facts found by him. When a request is presented such as in a jury trial ought to have been given, an exception to a refusal to grant it by a judge sitting without a jury must be sustained, unless the ground of refusal is distinctly stated or plainly appears in some way on the record and is such as to show that no harm has been done by the refusal, or unless it is obvious on the whole that no rights of parties have been endangered. Mere silent refusal to grant requests under these circumstances does not raise the presumption in favor of a trial court, which exists as to findings of fact made by it. This is no new principle of practice. The present judgment is simply an amplification of a rule inherent in the trial of jury waived cases, which has been more succinctly announced in earlier cases. *Miller v. Robinson*, 2 Allen, 610. *Kettell v. Foote*, 3 Allen, 212. *Lane v. Boston Five Cents Savings Bank*, 118 Mass. 260. *Turner v. Wentworth*, 119 Mass. 459, 464. It was stated by Chief Justice Holmes, in *Clarke v. Second National Bank*, 177 Mass. 257, 266, by Mr. Justice Loring in *Jaquith v. Davenport*, 191 Mass. 415, at 418, and by Mr. Justice Hammond in *Chandler v. Baker*, 191 Mass. 579, 585. To the same point see also *Maynard v. Royal Worcester Corset Co.* 200 Mass. 1, 5;

Bangs v. Farr, 209 Mass. 339. There is nothing inconsistent with this view in *Carnes v. Howard*, 180 Mass. 569. The statute upon which the court acted in *Insurance Co. v. Folsom*, 18 Wall. 237, required a procedure unlike our own. This rule does not impair the efficiency of the Superior Court, nor restrict its power to administer justice promptly and completely. It is not a recurrence to technicality of practice. It does not invite or justify an unreasonable number of prayers calculated rather to entrap the unwary than to elucidate the principles involved. It does not require that exceptions be sustained when it is not apparent upon the whole that some substantial error injuriously affecting the rights of parties has been committed. It does not compel the judge to deal in detail with fragmentary or indecisive evidence, to be troubled by trivial requests, or to make a special finding, although, as was pointed out in 177 Mass. at p. 264, often it may prove helpful if the grounds of his action are explained. But it does require him, when refusing a request, founded upon evidence, to state expressly or by fair inference, either that the legal proposition presented is unsound or inapplicable, or that the facts upon which it is predicated are not found to be true. Failure in this regard affords reasonable apprehension that there has been a miscarriage of justice.

2. The defendant's requests to the effect that the plaintiff could not recover upon the contract of March 7, 1900, were refused rightly. It does not appear to have been conceded that this contract when executed was not binding upon the parties. There was ample evidence that both parties supposed that the contract continued in force until August, and treated it as if in force. The only dispute about it was that the defendant asserted that there was a mistake in it as to the term of credit to be extended to it. It might have been found that the contention of the defendant in this regard, which was expressed by it in writing to the plaintiff, was accepted orally by the latter, and as thus corrected became binding upon the defendant, and available to the plaintiff, although not signed by both parties. The statute of frauds would be no defense under these circumstances. *Beach & Clarridge Co. v. American Steam Gauge & Valve Manuf. Co.* 202 Mass. 177, and cases cited at p. 181.

3. It was open for the trial judge to find that the contract

was not annulled by mutual consent. The vote of cancellation by the board of directors of the plaintiff was not decisive, and may have been found in the light of all the testimony and the attendant circumstances to have been conditional upon the execution of a new one in substitution, a condition which was never fulfilled.

4. The mutilation of a copy of the contract by the plaintiff was only one factor, not necessarily conclusive by itself, and to be considered with all the others in ascertaining the intent with which the act was done. *Attorney General v. American Legion of Honor*, 206 Mass. 183. The general finding for the plaintiff involved the conclusions as matter of fact that the contract of March 7, 1900, as modified was binding upon the parties and had not been annulled or cancelled. In this no error appears.

5. There were no circumstances, which required a finding of such inability on the part of the plaintiff to carry on its business or intention on its part to sell out as to justify the defendant in abandoning its contract. The action of the plaintiff at most amounted to a determination to ascertain at what price its business could be sold for. It did not fairly warrant the inference of inability to go on with the contract. *National Contracting Co. v. Vulcanite Portland Cement Co.* 192 Mass. 247, and cases cited at p. 256.

6. The plaintiff is a manufacturer of textile machinery in England. William Firth, for some years previous to 1900, had the exclusive sale of the plaintiff's machinery in America, and early in 1900 organized in the United States a corporation, of which he was the principal stockholder, president and manager, to take over his business. Under date of March 7, 1900, a written contract was made between the plaintiff and the defendant, by which the plaintiff gave the defendant "the sole right to sell their machinery in the United States of America and the Dominion of Canada," and the defendant undertook "to sell efficiently and to appoint representatives to travel regularly in those countries visiting the existing mills and the districts in which mills may be erected for the purpose of procuring orders for all the various machines made by" the plaintiff. The defendant further agreed not to engage in the sale of other similar machinery in

the designated territory during the term of the contract, and the plaintiff agreed to do all its business in the same territory through the agency of the defendant. All the machinery was to be invoiced to the defendant as delivered, and was to be paid for by the defendant within a specified time, the defendant to conduct the business in its own name. The contract was to continue in force for five years, unless terminated sooner by the plaintiff on six months' notice "in the event of it being found that the William Firth Company cannot work the business as efficiently as it has been worked by William Firth." The contract was terminated by the defendant without justification in August or September, 1900. The case was tried before a judge of the Superior Court without a jury, and a finding was made in favor of the plaintiff apparently based on the ruling that the plaintiff was entitled to recover the loss of profits on sales of machinery occasioned by the act of the defendant. We draw this inference from the refusal of the court to grant requests sixteen, seventeen, eighteen and nineteen of the defendant which cover this ground. The correctness of this ruling is challenged.

The fundamental principle of law upon which damages for breach of contract are assessed is that the injured party shall be placed in the same position he would have been in, if the contract had been performed, so far as loss can be ascertained to have followed as a natural consequence and to have been within the contemplation of the parties as reasonable men as a probable result of the breach, and so far as compensation therefor in money can be computed by rational methods upon a firm basis of facts. *Leavitt v. Fiberloid Co.* 196 Mass. 440, 446. *Wertheim v. Chicoutimi Pulp Co.* [1911] A. C. 301, 307. When a claim for prospective profits is brought to the test of this principle, recovery can be had where loss of profits is the proximate result of the breach, and is such as in the common course of events reasonably might have been expected, at the time the contract was made, to ensue from a breach, and where it can be determined as a practical matter with a fair degree of certainty what the profits would have been. But profits cannot be recovered, when the contract interpreted in the light of all its surroundings does not appear to have been made in contemplation of such damages, or when they are remote, or so uncertain, contingent, or speculative as not to

be susceptible of trustworthy proof. They must be capable of ascertainment by reference to some definite standard, either of market value, established experience or direct inference from known circumstances. *Gagnon v. Sperry & Hutchinson Co.* 206 Mass. 547, and cases cited at p. 555. *Dennis v. Maxfield*, 10 Allen, 188. This is simply a concrete application of the wider principle, which is frequently adverted to and which pervades the determination of all legal rights, to the effect that the complaining party must establish his claim upon a solid foundation in fact, and cannot recover when any essential element is left to conjecture, surmise or hypothesis. The difficulty is not so much in the statement of the general principle as in applying it. A comparatively insignificant incident may be in such combination with others as to lead to a conclusion in one decision apparently at variance with that reached in others. Each case must be decided on its own facts under this necessarily somewhat broad and comprehensive proposition.

This contract had a double aspect. In one respect it created the relation of principal and agent, and in another view it contemplated as between the parties purchases and sales. Looking at the latter first, it appears that while the plaintiff was to sell its machinery in the United States and Canada only through the defendant, the defendant was the buyer and was to make its profits by gains in resales, and was not to be paid by commissions. There was no agreement for any specific amount of sales. No maximum or minimum of aggregate annual transactions was stipulated. There was no obligation on the plaintiff to manufacture or on the defendant to take any definite number of designated machines. No prices were fixed. Whether there should be any sales depended upon a meeting of minds between the parties as to each article. Each sale would depend in the ordinary course of business upon the cost to the plaintiff of manufacturing, the profit demanded by it, the price which could be obtained in the American market, and the margin which the defendant might need to meet its expenses and a fair return upon capital invested and reasonable profit. No measure of remunerative profit for the plaintiff was settled, either by the contract or by the custom of the trade. It appeared that sometimes it had sold machinery to the defendant at a loss. There

was evidence that the selling price of the plaintiff and its actual cost of manufacture bore no settled ratio to each other. The expenses of the defendant and its fair profit contained inherently uncertain elements resting in large part upon the volumes of business done. The contract was silent as to any gauge of this, either by analogy to commissions, percentages, or otherwise. All these considerations, difficult if not impossible of proof, would enter into the minds of the parties in making each sale. The reported evidence shows plainly that there was great fluctuation in the demand by American cotton manufacturers for English-made machinery. This depended in material degree upon the mechanical ingenuity and business sagacity of competing American machine makers, and upon the prosperity of American cotton manufacturers. The conditions of both these branches of industry were subject to periods of depression and activity, as to which during the time covered by this contract there was much conflicting testimony. The variation in the annual sales by the plaintiff to the predecessor of the defendant in handling its American trade during the five years before 1900 had been from £15,000 to £140,000. The number of sales which the defendant would have been able to make to its customers was problematical. It could have made none, unless the prices fixed by the plaintiff upon its machines from time to time had been such as to enable it to attract American buyers. The defendant, although taking over at its incorporation the business conducted formerly by William Firth, had as a corporation no record of commercial achievement. Although Mr. Firth was the chief stockholder in the defendant, he was under no obligation to continue in its service, and might have sold his interest in it or left its employ at any time. The contract gave to the plaintiff no assurance that his ability would be retained in the business. It is conceivable that the contract might have been faithfully performed on both sides, and yet no important sales have been made. This might have arisen from a variety of circumstances liable to occur in ordinary trade. The plaintiff rests its claim for loss of prospective profits on two classes of evidence, — first, upon that showing the difference between its total sales in America for the five years next previous to the execution of the contract and its sales in America during the term of the contract,

and computing upon this difference the profit which it claims it would have made; and, second, upon testimony to the effect that immediately after the defendant's breach of contract its sales in America fell off greatly, as compared with those of the preceding seven months, until its new American agency was established. As to breaches of some contracts different in character from the one at bar and more explicit in their obligations, evidence of this nature might be important or even conclusive. *Loughery v. Huxford*, 206 Mass. 324. But the vagueness of this contract and the absence from it of elements vital to any binding or enforceable contract of sale have been pointed out. It must be construed as made and not reconstructed to meet an apparently unforeseen emergency. Perhaps no one of these factors by itself would be decisive. But taking them as a whole, we are of opinion that the terms of this contract show that loss of profits was not contemplated as damages for a breach, and these, together with all the circumstances, both before and since its execution and breach, furnish a basis too insubstantial for the ascertainment of profits lost by the plaintiff. Moreover the interpretation we have adopted seems consonant with what may have been the intention of the parties. A new mechanical device may render obsolete machinery previously in wide use. A change in the tariff policy of governments may seriously affect the course of international commerce. These and other contingencies may have induced a contract of such elastic and indefinite terms as to leave each party somewhat free to act in view of altered conditions as they might arise, without being bound to hard and unyielding provisions. *Noble v. Hand*, 163 Mass. 289. *Todd v. Keene*, 167 Mass. 157. *United Press v. New York Press Co.* 164 N. Y. 406. *Howard v. Stillwell & Bierce Manuf. Co.* 139 U. S. 199. *Eckington & Soldiers' Home Railway v. McDevitt*, 191 U. S. 103. *Cincinnati Siemens-Lungren Gas Illuminating Co. v. Western Siemens-Lungren Co.* 152 U. S. 200. *Troy Laundry Machinery Co. v. Dolph*, 138 U. S. 617. *Sapwell v. Bass*, [1910] 2 K. B. 486. *Ex parte Maclure*, L. R. 5 Ch. 737. *McCornick v. United States Mining Co.* 185 Fed. Rep. 748. *Connersville Wagon Co. v. McFarlan Carriage Co.* 166 Ind. 123.

The case at bar is distinguishable from *Speirs v. Union Drop Forge Co.* 180 Mass. 87. In that case the contract was to keep

an entire factory employed. Many of the prices for the staple articles to be manufactured were determined. In the value of the manufacturing plant and the prices fixed were facts sufficient in the opinion of a majority of the court to support that action. But these elements are wanting in the plaintiff's proof.

There is ground for the assessment of substantial damages, however, in the agency aspect of the contract. According to its terms the plaintiff was to have the active and intelligent service of the defendant, with a sufficient corps of salesmen, in pushing the sale of its products in the United States and Canada. That contract was broken by the defendant, whereby the plaintiff was deprived of that which it was entitled to receive. Thereupon it took the course, which it had a right to take in such an event, of establishing another agency in the United States and conducting its business through this substituted channel. Its reasonable expense incurred in repairing the loss cast upon it by the wrongful act of the defendant and in regaining the position acquired by it under its contract with the defendant is a legitimate element of damage and may be recovered. It is the direct result of the defendant's breach of the contract, and no doubt is capable of approximately accurate proof. It was or should have been in the contemplation of the parties as a consequence of the breach. *C. W. Hunt Co. v. Boston Elevated Railway*, 199 Mass. 220. *Hanson & Parker v. Wittenberg*, 205 Mass. 819. *Erie County Natural Gas & Fuel Co. v. Carroll*, [1911] A. C. 105, 117. The other exceptions become immaterial in view of the grounds upon which this decision rests.

It follows that these exceptions must be sustained, but only in respect to the assessment of damages. Hence the new trial must be confined to that issue.

So ordered.

213-367
215-357
215-561
236-631
237-2484
242-137
244-246
245-249
247-248
249-258

LENA M. SILVER & others vs. CHARLES L. GRAVES.

Suffolk. May 15, 1911. — September 6, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, BRALEY,
SHELDON, & RUGG, JJ.

Contract, Validity, Consideration. Release. Estoppel. Lord's Day. Pleading, Civil, Answer. Practice, Civil, Venue, Abatement. Words, "Satisfactory."

A promise made by the son of a testator, to whom was left the principal part of his father's estate, that if his three sisters, who had appealed from a decree of the Probate Court allowing the will, would withdraw their appeal he would "make it right with them with a certain sum," refusing to name any specific amount, and that he would "give them a sum of money that would be satisfactory," is a promise to pay to his sisters on such withdrawal what ought to satisfy a reasonable person or what is fair and just as between the parties under the circumstances existing, and, on the performance of the consideration by the sisters' withdrawal of their appeal, becomes a binding contract which is not bad for uncertainty or indefiniteness.

The withdrawal of an appeal from a decree of the Probate Court allowing a will is a good consideration for a promise to pay money to the person withdrawing the appeal, if the contest was a genuine one and made in good faith, whether in fact it was well grounded or not. In the present case there was held to have been evidence of good faith.

In an action by three sisters against their brother, who was the principal beneficiary under the terms of their father's will, and who also was made executor of that will, upon a promise of the defendant to pay the plaintiffs "a sum of money that would be satisfactory" if they would withdraw their appeal from a decree of the Probate Court allowing the father's will, it appeared that by the terms of the will each of the plaintiffs had been given the sum of \$100, that, after the promise was made by the defendant, the plaintiffs withdrew their appeal, and that thereafter each of them received from the defendant as executor a check for \$100 and executed and sent to the defendant a receipt for this sum releasing the executor and the estate "from any and all further liability to me on account of said estate." Held, that the acceptance of the legacies and the execution of the releases did not preclude the plaintiffs from prosecuting their action against the defendant on his personal undertaking, such action not being a claim against the estate of the father.

In an action upon an oral contract it is proper to admit in evidence a conversation which occurred on Sunday, if it was merely preliminary to the contract which was concluded on a secular day.

In an action on an oral contract, the defense that the contract was made on Sunday must be pleaded in order to be available or in order that a conversation relating to the contract should be objected to because it took place on Sunday.

The objection that an action of contract is brought in the wrong county by reason of the residence of the parties, all of whom are residents of the Commonwealth, can be taken only by a plea in abatement, and the question cannot be raised for the first time by a request for a ruling at the close of a trial.

CONTRACT, by three sisters against their brother, alleging that on February 16, 1905, the father of the plaintiffs and the defendant died, leaving a will by which the defendant was given the greater part of the father's estate, that the plaintiffs contested the allowance of this will and took an appeal from a decree of the Probate Court allowing it, that in consideration of the plaintiffs promising to withdraw their appeal the defendant promised to give them a reasonable sum therefor, that thereupon the plaintiffs withdrew their appeal, but that the defendant refused to perform his promise. Writ dated October 24, 1907.

The defendant's answer consisted of a general denial.

In the Superior Court the case was tried before *Lawton, J.* The facts appeared in evidence which are stated in the opinion.

It appeared that, after the withdrawal of their appeal, each of the plaintiffs received from the defendant as executor a check for \$100 and each executed and returned to him the following release: "Massachusetts, August 16, 1905. Received of Charles L. Graves, executor of the last will and testament of Enos D. Graves, late of Wendell, deceased, the sum of one hundred dollars in full for all legacies, distributive shares, demands or claims whatsoever against said deceased or his estate, and said executor and his bondsmen are hereby released from any and all further liability to me on account of said estate."

A certified copy of the inventory of the father's estate filed by the defendant as executor was offered in evidence by the plaintiffs and was admitted by the judge against the defendant's exception. The inventory showed personal estate as per schedule, \$10,912.90, real estate \$2,175.50. The plaintiffs called the defendant to the witness stand and the defendant stated subject to the defendant's exception that the net amount received by him as residuary legatee approximated \$7,500.

It appeared in evidence that at the time of the bringing of the writ none of the plaintiffs resided in the county of Suffolk except the plaintiff Harriett Tenney. She testified that she was a dressmaker who went to work by the day and that she had lived at various places in Boston; that when not working she went to her sister's home in Gardner and that letters addressed to her in Gardner would reach her.

At the close of evidence for the plaintiffs the defendant asked the judge to rule:

"1. That upon all the evidence, as a matter of law, the plaintiffs could not recover.

"2. That there was a misjoinder of parties, and, if any action existed, it was several and not joint.

"3. That this court [the Superior Court for the county of Suffolk] did not have jurisdiction of the action."

The judge refused to make any of these rulings, and submitted the case to the jury, who returned a verdict for the plaintiffs in the sum of \$2,400. The defendant alleged exceptions.

The case was submitted on briefs at the sitting of the court in May, 1911, and afterwards was submitted on briefs to all the justices.

W. A. Davenport, for the defendant.

G. H. Tinkham & S. E. Duffin, for the plaintiffs.

RUGG, J. The father of the three plaintiffs and of the defendant was survived by them and a widow. By his will each of the plaintiffs was given \$100, the widow \$1,000, and the defendant the residue of the estate amounting to about \$7,500. The defendant was made executor. The plaintiffs appealed from a decree of the Probate Court allowing the will. There was evidence tending to show that during the pendency of the appeal there were several conferences between the plaintiffs or some of them and the defendant, at which the defendant promised the plaintiffs that, if they would withdraw the appeal and let the will be allowed, he would "make it right with [them] with a certain sum" and "give [them] a sum of money that would be satisfactory." He declined to name any specific sum of money which he would pay to them. As a consequence of his promise the plaintiffs withdrew their appeal, and the will was allowed finally. This action is brought to recover for the breach of this agreement.

1. The Superior Court refused to rule that upon all the evidence the plaintiffs could not recover. It is urged that this ruling should have been given for the reason that there was no evidence sufficient to show a binding contract. The promise was between parties competent to contract with each other. It was not tainted with illegality. It was to do a specific thing, namely, to withdraw an appeal in proceedings in court which

had been seasonably taken and was pending. The pendency of a genuine cause in court is a definite subject about which to contract. Forbearance to prosecute further such a cause is an adequate consideration for a binding agreement. The only matter which was indefinite was the price to be paid for such forbearance. This was not left wholly to conjecture, for the parties were not silent about it, but might have been found to have agreed that it was to be a sum which would be "right" or "satisfactory." This means what ought to satisfy a reasonable person, or what was fair and just as between the parties. *Handy v. Bliss*, 204 Mass. 513, 519. In determining what ought to be satisfactory to a rational person, all the circumstances of the controversy should be considered, and each given its due weight. The conditions under which the will was executed, the physical health and mental power and individual characteristics of the testator, the strength or weakness of the grounds upon which any contest of the allowance of the will might have been predicated justly, the amount of property which each of the plaintiffs might have received in case of intestacy, and the sum actually given to each under the will, for example, are elements to be considered in ascertaining what would be a fair compensation for the concession by the plaintiffs and the advantage to the defendant. It is true that in some aspects of the case there would be little if any gain to the parties from a contract of this sort. In some respects the range of inquiry might be as extensive in an action like this as in the original controversy. But that is no ground for not enforcing the contract, if it is found to have been made. The only element left undetermined in this contract is that of price. But this is not infrequently found to be indefinite in contracts of sale and for work and labor. It is not necessary that the subject matter of such a contract should possess a price in the market or be bartered commonly in trade. It is enough if there is a reasonable value, which can be ascertained by the practical methods of trial. The difficulty of fixing the compensation is no greater than occurs in many cases. *Maynard v. Royal Worcester Corset Co.* 200 Mass. 1, 8. *C. W. Hunt Co. v. Boston Elevated Railway*, 199 Mass. 220, 233, 236. *Noble v. Joseph Burnett Co.* 208 Mass. 75. This contract has become executed fully on the side of

the plaintiffs by doing that which they agreed to do, and that which they can never recover back in kind. The withdrawal of their appeal wholly deprived them of opportunity for contesting the will. When a contract has been executed on one side, the law will not permit the injustice of the other party retaining the benefit without paying unless compelled by some inexorable rule. No insuperable difficulty arises as to the uncertainty or indefiniteness of this contract. *Carnig v. Carr*, 167 Mass. 544. *Raymond v. Rhodes*, 185 Mass. 337. *Jewry v. Busk*, 5 Taunt. 302. *Acebal v. Levy*, 10 Bing. 376, 382.

2. There is no doubt that the forbearance to prosecute a genuine contest in the courts is a sufficient consideration for a promise. In order that it may have this effect, however, the intention must be sincere to carry on a litigation which is believed to be well grounded and not false, frivolous, vexatious or unlawful in its nature. The abandonment of an honest purpose to carry on a litigation, even though its character be not such, either in law or fact or both, as ultimately to commend itself to the judgment of the tribunal which finally passes upon the question, is a surrender of something of value, and is a sufficient consideration for a contract. But the giving up of litigation, which is not founded in good faith, and which does violence to an enlightened sense of justice in view of the knowledge of the one making the concession, is not the relinquishment of a thing of value, and does not constitute a sufficient consideration for a contract. *Blount v. Wheeler*, 199 Mass. 330, 336, and cases cited. *Prout v. Pittsfield Fire District*, 154 Mass. 450. *Kennedy v. Welch*, 196 Mass. 592. *Palfrey v. Portland, Saco & Portsmouth Railroad*, 4 Allen, 55. *Attorney General v. American Legion of Honor*, 206 Mass. 193, 195. As was said by Morton, J., in *Mackin v. Dwyer*, 205 Mass. 472, at 476, "A threat to contest the will, merely for the purpose of compelling the defendant to settle with her and buy his peace without any intention on her part of actually contesting the will if no such settlement was made, would not be sufficient and would not constitute a valid consideration for the defendant's promise." No exception was taken to the instructions given upon this branch of the case, and therefore it must be assumed that they were ample and correct.

The only point open is that a verdict should have been directed

for the defendant on the ground that there was not sufficient evidence to support a finding of an honest intention to prosecute a real contest. The burden of proof in this regard rested upon the plaintiffs. There was some evidence tending to show that the defendant had tried to dissuade one of the plaintiffs from visiting her father during his last illness. There was testimony also that the plaintiffs tried to convince the defendant that their action in claiming the appeal was to protect their rights, and that they thought that they succeeded in that effort. There is an implication possible from the defendant's promise to do "what was right" by the plaintiffs if they would withdraw their opposition to the will, that this claim seemed to him to have some foundation in justice. Moreover, the jury saw all the parties to the controversy upon the witness stand, and their manner of testifying may have furnished the basis for an opinion as to the purpose of the plaintiffs in making the contest. These and all the other circumstances of the case, together with the presumption, which exists commonly that people act in good faith rather than corruptly (*Interstate Commerce Commission v. Chicago Great Western Railway*, 209 U. S. 108, 119), rendered improper a ruling that a jury could not find that the contest which the plaintiffs forbore upon the defendant's promise was a real one honestly undertaken. *Rector of St. Mark's Church v. Teed*, 120 N. Y. 588, 587.

3. The plaintiffs were not precluded by the acceptance of their general legacies and the signing of formal releases from instituting the present action. Their action is against the defendant individually for a personal undertaking entered into by him before his appointment as executor. It is not a claim against the estate of the father.

4. The conversation which occurred on Sunday was admitted in evidence properly. It was merely preliminary to the contract which was concluded on a secular day. *Miles v. Janvrin*, 200 Mass. 514, 518. Moreover, the illegality of the contract was not pleaded, and hence could not be proved as of right. *O'Brien v. Shea*, 208 Mass. 528.

5. No error is shown in the admission of the inventory of the estate of the testator in evidence. It was a circumstance pertaining to the estate, and it does not appear that it could have injured the defendant. In some aspects of the evidence it is possible that it

may have been competent, as, for example, an acknowledgment by the defendant of the items of property left by the testator.

6. The promise might have been found on all the evidence to have been to the sisters jointly, and therefore all might join as plaintiffs in a single action. The tenor of the oral testimony, as well as the rational inferences from the situation in which the defendant was placed, seem to indicate that his promise, if made at all, was made to all the plaintiffs jointly. The second request was refused rightly.

7. The only basis for the request, to the effect that the court did not have jurisdiction of the action, seems to be that the residences of the plaintiffs were not such as warranted the laying of the venue in Suffolk County. This did not go to the jurisdiction of the court, but was in the nature of abatement, and could not be raised for the first time by a request for instructions at the close of a trial. *Craig Silver Co. v. Smith*, 163 Mass. 262, 268. *Hastings v. Bolton*, 1 Allen, 529.

Exceptions overruled.

MEMORANDA.

ON the seventh day of September, 1911, the Honorable MARCUS PERBIN KNOWLTON resigned the office of Chief Justice of this court, which he had held since the seventeenth day of December, 1902, having held the office of a Justice of this court since the fourteenth day of September, 1887.

ON the thirteenth day of September, 1911, the Honorable ARTHUR PRENTICE RUGG was appointed Chief Justice of this court, having held the office of a Justice of this court since the twenty-sixth day of September, 1906. He first sat as Chief Justice at the sitting of the court at Springfield on the twenty-sixth day of September, 1911.

ON the twentieth day of September, 1911, the Honorable CHARLES AMBROSE DECOURCY, one of the Justices of the Superior Court, was appointed a Justice of this court. He first sat with this court at the sitting of the court at Worcester on the second day of October, 1911.

LUIGI FLITO'S CASE.

Suffolk. June 19, 1911.—September 13, 1911.

221-181
754-105

Present: MORTON, HAMMOND, BRALEY, & SHELDON, JJ.

Habeas Corpus. Practice, Criminal, Complaint.

The writ of *habeas corpus* will not be issued to take the place of an appeal, a bill of exceptions or a writ of error in a criminal case where the defendant has been tried by a court having jurisdiction of the crime with which he was charged and where the only question raised is in regard to the correctness of the rulings made at the trial in that court.

A prisoner, who has been sentenced for a crime after a trial before a court having jurisdiction of the offense charged and of the person of the defendant, will not be granted a writ of *habeas corpus* on the ground that the complaint on which he was tried and convicted was unlawful because the justice of the court who directed the issuing of the warrant upon the complaint did not examine the complainant and his witnesses under oath as prescribed by R. L. c. 217, § 22, before the complainant subscribed and swore to the complaint, but merely asked him for a statement of the facts relating to the charge, which the complainant gave orally and not under oath; because, even if such a complaint is defective and the prisoner could avail himself of the defect, which here was not intimated, the writ of *habeas corpus* has no application to such a case.

PETITION, filed in the Supreme Judicial Court on May 2, 1911, for a writ of *habeas corpus*, by a prisoner held in custody at the House of Correction at Deer Island in Boston, to which he was committed under a warrant of commitment issued from the Superior Court of the county of Suffolk, after having been tried in that court and found guilty of the crime of larceny of property of the value of \$19, on an appeal taken by him from a sentence imposed upon him for the same crime by the Municipal Court of the City of Boston, alleging that the complaint on which the petitioner thus was tried and convicted was unlawful, because the justice of the Municipal Court of the City of Boston who directed the issuing of the warrant upon the complaint did not examine the complainant and his witnesses under oath as prescribed by R. L. c. 217, § 22, but merely asked the complainant for a statement of the facts relating to the charge, which the complainant gave orally and not under oath, although the complainant afterwards subscribed and swore to the complaint before an assistant clerk of the Municipal Court of the City of

Boston. The petition further alleged that when the defendant's counsel first discovered such illegality, the defendant filed in the Superior Court a special plea setting forth such illegality, which was overruled by that court, and that the defendant also asked the judge of the Superior Court to order a verdict for him, and, this being refused, after a verdict of guilty had been returned against him, made a motion to have the verdict set aside on the ground that the complaint was unlawful, which was denied, and that the petitioner saved exceptions as to his special plea and all of his motions.

The case was heard by *Morton, J.*, upon the return of an order of notice to show cause why a writ of *habeas corpus* should not issue. It appearing that the facts stated in the petition and answer were true, the justice ruled that the Municipal Court of the City of Boston had jurisdiction of the offense and of the person of the petitioner, and that the error, if error there was, was an error of law or an irregularity of procedure, and did not arise from a want of jurisdiction. He ordered that the petition be dismissed, and, at the request of the petitioner, reported the case to the full court for determination, the writ to issue or the petition to be dismissed as to the full court should seem proper.

The case was submitted on briefs.

F. M. Zottoli, for the petitioner.

T. D. Lavelle, Assistant District Attorney, for the Commonwealth.

SHELDON, J. The petitioner does not deny that the crime which he has committed was within the jurisdiction of the Municipal Court of the City of Boston, or that that court properly could receive a complaint and issue a warrant against him, and try him thereon when brought in upon due process.

His contention is that the complaint and the warrant were both invalid because there was not, before the written complaint was received, an examination on oath of the complainant and his witnesses. R. L. c. 217, § 22. St. 1866, c. 279, § 8. St. 1821, c. 109, § 2. Rev. Sts. c. 135, § 2. We do not intimate that there is anything in this contention, or that it could have availed the petitioner if it had been properly presented. R. L. c. 160, § 36. *Commonwealth v. Farrell*, 8 Gray, 468. And see

Commonwealth v. Tay, 170 Mass. 192; *Commonwealth v. Conlin*, 184 Mass. 195, 197.

But, even if the contention were sound, this petition could not be maintained. The writ of *habeas corpus* is not to take the place of an appeal, a bill of exceptions, or a writ of error, in a case like this, which was within the jurisdiction of the court where it was tried, and in which the only question raised is as to the correctness of the rulings made in that court. *Fleming v. Clark*, 12 Allen, 191, 194. *Sennott's case*, 146 Mass. 489, 492. *Commonwealth v. Huntley*, 156 Mass. 286. *Bishop, petitioner*, 172 Mass. 85. *Sellers' case*, 186 Mass. 301.

Petition dismissed.

SUMNER D. YORK, administrator with the will annexed, vs.
MARY E. FLAHERTY & others.

Essex. May 15, 1911. — October 16, 1911.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ. 237-6244

Insurance, Life. Husband and Wife. Fraud. Statute of Limitations. Assignment. Equity Pleading and Practice, Master's report, Reservation, Parties. Equity Jurisdiction, To recover premiums on life insurance policy paid in fraud of creditors, Interest. Interest. Trust. Executor and Administrator.

The right of action for a recovery of the amounts of premiums, which have been paid upon a policy of life insurance by the insured in fraud of his creditors and which with interest thereon, by R. L. c. 118, § 78, now St. 1907, c. 576, § 78, "subject to the statute of limitations" are to inure to the creditors' benefit "from the proceeds of the policy," does not accrue, where there has been no surrender of the policy under a clause providing for a surrender for value at the option of the insured, until the maturity of the policy by the death of the insured; and therefore, where an insured, who for more than six years had been insolvent and had been paying premiums in fraud of his creditors upon a policy of which his wife was the beneficiary, has died without the policy being surrendered, and the insurance company has paid to the widow the proceeds of the policy, the administrator of the estate of the insured in a suit begun a year after the death of the insured can recover from the widow the amount of all premiums paid by the insured within six years before his death with interest on each sum so paid from the date of its payment.

One, who had insured his life for the benefit of his wife and who was insolvent and was paying premiums upon the policy in fraud of his creditors, procured a loan from the insurance company and gave to the company a promissory note signed

both by himself and by his wife and secured by an assignment of the policy also signed by them both. After the death of the insured the company paid to the widow, who availed herself of the protection of R. L. c. 118, § 73, now St. 1907, c. 576, § 73, the proceeds of the policy less the amount of the loan, and the administrator of the estate of the insured, which had been declared insolvent, sought by a suit in equity to recover from the widow under the provisions of the above statute the amount of the premiums paid in fraud of creditors. The widow contended that the loan with the policy as security was in effect an advance payment by her for her husband from the proceeds of the policy, which were to become hers, and therefore that it was in effect a debt owed to her by the estate, and that she should be allowed to cut down the amount to be paid to the plaintiff by the amount of the loan. *Held*, that the widow, having availed herself of the protection of the statute, also must be bound by its requirement that the amounts of the premiums paid in fraud of creditors should inure to their benefit from the proceeds of the policy, and that her contention was without merit.

An instrument in writing by one who had insured his life in the sum of \$5,000 for the benefit of his estate, requesting the insurance company to alter the contract of insurance by making \$4,000 of the amount of the policy payable to the wife, and \$1,000 thereof payable to the son of the insured, after the company in writing has assented to and has complied with the request, operates as an effectual transfer, although neither the wife nor the son knew thereof until after the death of the insured; and, where such transfer was made in fraud of creditors, while the direction for the payment of \$1,000 to the son is ineffectual, the direction to pay \$4,000 to the wife has full force by reason of St. 1907, c. 576, § 73.

In a suit in equity by the administrator of one who had insured his life, against the insurance company, among other defendants, it appeared that the company was holding a part of the proceeds of the policy which the insured in fraud of creditors had attempted to convey to his son, but it did not appear that the money was retained merely in consequence of a demand of creditors of the insured that it should be held and of the suit brought by the administrator in their behalf, or that the company had realized any interest thereon, and a master to whom the suit was referred charged the company, without objection on its part, with interest on the sum so held. The case was reserved for determination by this court upon the pleadings and the master's report. *Held*, that the master's report must be followed and that the company must be charged with interest.

Where one, who held a policy of life insurance payable to his estate, in fraud of his creditors transferred the policy to his wife, and died, the wife may retain the proceeds of the policy in accordance with the provisions of St. 1907, c. 576, § 73, although the insured during his lifetime induced creditors to make advances to him by oral representations that he had insurance which in case of his death would be available and sufficient to satisfy their claims.

Where an insolvent person holds a policy of life insurance payable to his estate and, knowing himself to be insolvent, pays premiums upon it for many years and up to a short time before his death, when he transfers the policy to his wife in fraud of his creditors and dies before any further premium is paid, and it does not appear that he intended at the time of the payment of the premiums thus to transfer the policy later, the wife may retain the entire proceeds of the policy under St. 1907, c. 576, § 73, because, the estate having been the beneficiary

of the policy at the time when the premiums were paid, it does not appear that the premiums were paid in fraud of creditors.

The administrator of an estate which has been declared insolvent is the proper person to sue for the amount of a policy of life insurance upon the life of the decedent which before his death he had transferred in fraud of his creditors, and also under St. 1907, c. 576, § 73, for premiums paid by the insured in fraud of his creditors upon a policy which he had transferred to his wife.

BILL IN EQUITY, filed in the Superior Court on July 25, 1907, by the administrator with the will annexed of the estate of one John J. Flaherty, late of Gloucester, against the widow of the decedent, Mabel E. Flaherty, and his son, John J. Flaherty, Jr., and the Massachusetts Mutual Life Insurance Company, alleging that the estate was insolvent and seeking an accounting with regard to, and the recovery of, sums alleged to have been paid to the defendant insurance company by the decedent in fraud of his creditors as premiums upon two policies of life insurance, one for \$10,000 and one for \$5,000, and also the recovery of the proceeds of the \$5,000 policy, the beneficial interest in which the plaintiff alleged had been transferred by the decedent from his estate to his widow and son either in fraud of his creditors or when the decedent had not sufficient mental capacity to make the transfer.

The case was referred to Hollis R. Bailey, Esquire, as master. His report contains the following findings in substance:

On January 4, 1890, the decedent took out a policy of insurance for \$5,000 on his own life in favor of his then wife, Abbie S. Flaherty. On October 26, 1891, Abbie S. Flaherty died and the policy by its terms became payable to the estate of the insured and it remained so until July 14, 1906, although in 1896 the insured married Mabel E. Flaherty. On March 23, 1903, and on August 23, 1904, the insured borrowed from the company amounts aggregating \$780, in each case giving to the company a promissory note for the loan and an assignment in writing of his interest under the policy as security.

In April, 1906, the insured became mortally sick.

On July 14, 1906, acting under the advice of counsel, he executed on a blank furnished by the insurance company the following:

"The Massachusetts Mutual Life Insurance Company is hereby authorized and requested to amend [the \$5,000] contract for in-

surance . . . as follows:— Make the proceeds . . . payable in the event of my death as follows:— \$1000 to John J. Flaherty, Jr., my son and the balance to Mabel E. Flaherty, my wife or the whole to the survivor and if neither beneficiary survives me to my executors, administrators or assigns.

“The said change in benefit is to be subject to the prior claims of the Massachusetts Mutual Life Insurance Company which holds said policy by assignment as collateral security for policy loan. In case the policy is closed out on account of the non-payment of premium or other indebtedness, or non-payment of said loan or interest thereon in accordance with the terms of any such assignment any balance which may be due on account of the policy shall be paid as directed in the assignment of said policy last executed in connection with any loan which has been or shall be made by said company under said policy.

“And in consideration thereof it is hereby agreed that these changes shall be an amendment to and form a part of the original application and policy and also that the unpaid portion of any year's premium shall be and it is hereby acknowledged an indebtedness to the said company.”

At the time of the execution of the foregoing instrument, the insured was insolvent and knew or reasonably ought to have known that he was so, and by what he did he intended to place the proceeds of the \$5,000 policy beyond the reach of his creditors. At different times previous to July 14, 1906, as an inducement to certain of his creditors to sign or indorse notes for his accommodation, he had told them in substance that he held insurance policies which he was keeping paid up and that this insurance would be available and would be sufficient on his death to pay his debts.

On July 18, 1906, the company appended to the policy the following statement, signed by its secretary:

“Upon the representation of the insured that Abbie S. Flaherty the beneficiary has deceased the proceeds of this policy are hereby made payable subject to the prior claims of the Mass. Mutual Life Ins. Co. as follows: \$1,000 to John J. Flaherty, Jr., son of the insured; the balance to Mabel E. Flaherty, wife of the insured, or the whole to the survivor of them if living at the death of the insured, if neither beneficiary survives the insured to the

executors, administrators or assigns of John J. Flaherty the insured, a legal request in due form for payment in such manner having been received."

Neither the insured's wife nor his son had any knowledge of the above instruments or of either of them until after his death. The policy was in the possession of the insurance company.

On July 24, 1906, the insured died. After his death the widow and the son, on learning of the above instruments, elected to take the benefit of them.

The \$10,000 policy was taken out by the insured on September 26, 1896, and was made payable to his second wife, Mabel E. Flaherty. On August 28, 1904, the insured borrowed \$885 from the company for which he gave a promissory note, signed both by himself and by his wife, and secured by an assignment of the policy likewise signed both by himself and by his wife.

For more than six years previous to his death the insured's liabilities at all times had exceeded his assets by a considerable amount and he knew or reasonably ought to have known his insolvent condition. During those six years he paid to the company as premiums on the \$10,000 policy sums aggregating \$1,513.10. Interest on the sums so paid from the dates of their respective payments to the date of the suit amounted to \$371.60. The sum of the premiums paid during the six years immediately preceding the date of the suit was \$1,255.10 and interest thereon, computed in the same way, was \$268.41.

The insurance company paid the widow on August 16, 1906, \$9,147.68, being the full amount of the \$10,000 policy less the amount due on the loan secured by its assignment; and on the same day the company paid her \$3,222.63 upon the \$5,000 policy, which was the full amount of that policy less the loans made on its security and the \$1,000 attempted to be assigned to the son. That \$1,000 the company retained.

The master ruled that the insurance company should pay to the plaintiff the \$1,000 which it had retained and which the son claimed, with interest amounting to \$218.50; and that the widow should pay to the plaintiff \$1,255.10, as premiums paid on the \$10,000 policy in fraud of creditors within six years before the filing of this suit, and interest on such payments to the date of the filing of the report (June 7, 1910), amounting to

\$484.28; as well as a proportionate part of the premiums paid on the \$5,000 policy within six years before the commencement of this suit, and interest thereon.

The case was reserved for determination by this court by Fox, J.

The case was submitted on briefs.

A. P. White & F. H. Tarr, for the plaintiff.

H. Parker & L. S. Simonds, for the defendants.

SHELDON, J. 1. It is not disputed that Mrs. Flaherty is entitled to hold the net proceeds of the \$10,000 policy on the life of her late husband, or that subject to the statute of limitations she is liable to account to the plaintiff for the premiums which were paid thereon by her husband. R. L. c. 118; § 78. St. 1907, c. 576, § 73. *Bailey v. Wood*, 202 Mass. 549. *Bailey v. Wood*, 202 Mass. 562. The master ruled that this liability was for the premiums paid within six years before the bringing of the suit; the plaintiff contends that his cause of action did not accrue until the death of Mr. Flaherty, and includes the premiums paid within six years before that event, being all the premiums which were found to have been paid in fraud of creditors. In our opinion, this contention is correct.

These premiums by the terms of the statute are to inure to the benefit of the creditors "from the proceeds of the policy," and in no other way. The right to recover their amount cannot accrue until the maturity of the policy, which was to be upon Mr. Flaherty's death. The stipulation for surrender values does not affect this, for that was conditional upon a surrender by the beneficiary, which never was made or required to be made. *Blinn v. Dame*, 207 Mass. 159. *Wilde v. Wilde*, 209 Mass. 205. But the statute of limitations begins to run only after the cause of action has accrued. R. L. c. 202. Accordingly it has been held in Alabama that a cause of action like this arises and becomes fixed upon the death of the person insured. *Lehman v. Gunn*, 124 Ala. 213. No action could have been maintained by a creditor of Mr. Flaherty at the time of the payment of any premium, either against the company (*Central Bank of Washington v. Hume*, 128 U. S. 195) or any one else, for there could be then no proceeds of the policy. There is nothing to the contrary of this in *Troy v. Sargent*, 132 Mass. 408.

There was, if there could have been, no fraudulent concealment in the meantime of the cause of action. R. L. c. 202, § 11. The master has not found such a concealment by any one; upon the facts reported, we cannot make such a finding, even as to Mr. Flaherty, under the rule stated in *Knowles v. Knowles*, 205 Mass. 290, 294. We need not consider whether the rights of Mrs. Flaherty would have been affected by such conduct on the part of her husband.

2. We need not determine whether the loan made to Mr. Flaherty by the insurance company should be treated as merely a loan to him secured by a pledge of the property of his wife, or as an advance payment of a part of the amount to become due under the policy and operating to reduce that amount *pro tanto*, and so as made in legal effect to the wife, to whom the policy was payable and who joined in signing the note. However this may be, full premiums, lessened only by the right to share in the surplus funds of the company, were in fact paid both before and after the loan was made; and the statute is express that these payments shall inure to the benefit of the husband's creditors. It is immaterial whether Mrs. Flaherty, having paid the loan out of the proceeds of the policy after her husband's death, has a claim for indemnity against his insolvent estate, under the rule of *Brown v. Bizby*, 190 Mass. 69, and cases there cited. She has chosen to claim the benefit of the statute which gives to her the proceeds of the policy at the expense of his creditors; she must bear the burden which the same statute puts upon her by accounting to them for the amount of the premiums which were paid in fraud of their rights. As was said by the plaintiff in his brief, it would frustrate the purpose of the statute to allow her to diminish this amount by deducting therefrom the amount of this loan, or even by reducing it in proportion to the amount of the loan as compared with the total amount of the policy.

It follows that as to this part of the case the plaintiff is entitled to recover from Mrs. Flaherty the sum of \$1,518.10, instead of the smaller sum of \$1,255.10, with interest.

3. There was a sufficient transfer of the \$5,000 policy to Mr. Flaherty's second wife and son, although it was not known to them until after his death. This transaction was not in form an assignment, although its effect was the same and in its legal

operation it was tantamount to an assignment. *Bailey v. Wood*, 202 Mass. 562, 573. It was effected by an amendment or alteration of the terms of the policy made by the insurance company at the request of the person insured, these being then the only parties in any way interested in the contract of insurance. This made the terms of the policy such that \$4,000 were to be paid on the death of the insured to his second wife, and \$1,000 to his son. It thus stood as if the policy originally had been made payable to them. No consent on their part was required. The validity of a policy of life insurance made payable to the wife or child of the insured does not depend upon their consent to the provision when originally made. *Derome v. Vose*, 140 Mass. 575. *Johnson v. Alexander*, 125 Ind. 575. No such requirement was made in the statute. R. L. c. 118, § 73. The case is not within the decisions in which it has been held that a gift is incomplete and invalid unless there has been something equivalent to a delivery and acceptance. We need not consider whether it is open to the plaintiff upon the pleadings to contend that the gift of the policy was incomplete and ineffectual; for such a contention could not be sustained.

4. It remains true, however, that this policy was not originally effected in favor of either of these beneficiaries, but has only since been made payable to them by a transaction which was in fraud of Mr. Flaherty's creditors. *Matthews v. Thompson*, 186 Mass. 14. Such a transfer made to a wife cannot itself be avoided by creditors; made to a son, it can be. *Bailey v. Wood*, 202 Mass. 562. And it seems plain that the transfer to the wife of a stated part of the amount of the policy cannot be avoided by creditors any more than could have been done if the whole amount had been payable to her. But the plaintiff, being entitled to avoid the transfer to the son, can hold the \$1,000 made payable to him. As the insurance company has retained this sum, the plaintiff is entitled to a decree therefor against the company.

5. The master has charged the insurance company with interest on this sum. If the company had retained the money merely in consequence of the demand of the creditors in this suit and of these proceedings by them or in their behalf, and was not shown to have realized any interest thereon, it ought not to have

been charged with such interest. *Norris v. Massachusetts Mutual Life Ins. Co.* 131 Mass. 294, 296. But no such facts have been found, nor have findings as to these questions been asked for by the company. It has made no objection to this charge of interest; and of course no other defendant can raise the question. We must as to this follow the master's report.

6. The transfer to the wife cannot be avoided by reason of the representations and assurances made by Mr. Flaherty to some of his creditors. The master has found that there was no assignment legal or equitable of any insurance as security and no trust created for the benefit of these creditors or of his creditors generally. For that reason such cases as *Clark v. Flint*, 22 Pick. 231, are inapplicable.

7. No premiums were paid on the \$5,000 policy after its transfer, and we do not think that it can be said that any premiums paid before that time were paid in fraud of the creditors of the insured. When these were paid, after the death of his first wife, he alone had the beneficial interest in the policy, and the creditors suffered no prejudice. It was not found, and we do not see that it ought to have been found, that he made any of these payments with the intention of transferring afterwards to his second wife, or to any one else, the fund which should be created or increased by these payments. If this had been the case, a different question would be presented. The fund itself, but for the provisions of the statute, could have been appropriated by the creditors; so far as it was made payable to the son of the insured it is now to be given to them. We cannot give them also the premiums which were not paid in fraud of their rights; and we need not discuss the questions which have been argued as to any apportionment of these premiums.

8. The estate of Mr. Flaherty having been found to be insolvent, the plaintiff is the proper person to bring and maintain this bill. *Wall v. Provident Institution for Savings*, 6 Allen, 320. *Parker v. Flagg*, 127 Mass. 28. *Putney v. Fletcher*, 148 Mass. 247.

The plaintiff is to have a decree against the defendant insurance company for \$1,000 with interest as found by the master and with further interest until the entry of the final decree, and against the defendant Mabel E. Flaherty for \$1,513.10 with

interest of \$360.61 to July 25, 1907, the date of bringing suit, and with further interest to the date of the final decree. He should have costs against all the defendants.

So ordered.

ROBERT L. KEENEY vs. SPRINGFIELD STREET RAILWAY
COMPANY.

ARTHUR RENARD vs. SAME.

Hampden. September 25, 1911. — October 16, 1911.

Present: RUGG, C. J., HAMMOND, BRALEY, & SHELDON, JJ.

Negligence, In use of highway.

In an action against a street railway corporation for damage to the plaintiff's automobile from being run into by an electric car of the defendant when it was standing upon the track on which the car was approaching, there was evidence that the accident occurred on a dark night when a little snow was falling, that before the accident the plaintiff was driving his automobile on the highway at a speed of not more than fifteen miles an hour, that he saw a light ahead of him and thought that it was on the rear of a vehicle going in the same direction with himself, that accordingly he turned to the left to go around it, when he discovered that a horse and wagon were coming toward him and in trying to avoid a collision turned sharply to the left, that the rear of the automobile skidded slightly in the wet snow and struck the horse a glancing blow, which did not throw down the horse or upset the wagon, that at the instant of contact the plaintiff turned his wheel and put on his brakes so suddenly as to stall his engine and that the automobile started skidding, stopping finally across the track of the defendant, that, when the automobile stopped, its top collapsed covering the sides and tonneau and also falling upon the front seat, that the plaintiff crawled out and examined his automobile, when he noticed the glare of the headlight of an approaching electric car, then distant over a quarter of a mile, that he started running up the track toward the approaching car, and as he got into the glare of the headlight held up his arms and waved them, that he ran thus a distance of about one hundred and seventy-five feet from the automobile, until he was obliged to step to one side to avoid being run over, that the car passed him without slackening its speed and moving at the rate of at least from thirty-five to forty miles an hour, that as the car passed the plaintiff stood on the travelled way waving his hands, and the car proceeded to run down the automobile. *Held*, that there was evidence for the jury, not only of negligence of the defendant's motorman, but also of due care on the part of the plaintiff.

TWO ACTIONS OF TORT, against a street railway corporation, the first for damage to an automobile belonging to the plaintiff from being run into by an electric car of the defendant on the

night of November 28, 1909, on Longmeadow Street in Longmeadow, and the second by the chauffeur of the plaintiff in the first case, who was in the tonneau of the automobile at the time of the collision, for personal injuries thereby sustained. Writs dated January 15 and March 17, 1910.

In the Superior Court the cases were tried together before *Sanderson, J.* There was evidence introduced by the plaintiffs of the following facts:

The accident happened between eleven and twelve o'clock on a dark night while the two plaintiffs were on their way from Springfield to Somerville, Connecticut, and were travelling south. It had been snowing during the evening but this nearly had ceased when the plaintiffs left Springfield, and at the time of the accident it was snowing very little. There were two or three inches of new snow on the ground. The two men were alone in the automobile, the plaintiff Keeney driving and sitting in the front seat on the right behind the glass front, which was up, and the plaintiff Renard, who was Keeney's chauffeur, sitting in the tonneau. The top of the car was up. The back curtain was on but not the side curtains. The car was equipped with electric side lights and a tail light, and with two gas headlights, all of which were lighted. Just before the accident the plaintiff Keeney was driving in the centre of the travelled way. He noticed a light, which afterwards was found to be a lantern, ahead, and, supposing it to be on the rear of a vehicle going in the same direction that he was, he turned the automobile to the left, intending to go around it. An instant later he saw that a horse and wagon were travelling north, toward him. As Keeney turned to the left the driver of the horse turned to his right. Instantly Keeney turned his steering wheel "way over to the left in order to avoid him." The rear of his car skidded slightly in the wet snow and the automobile struck the horse a glancing blow near the shoulder, and as it passed him some portion of the harness or shaft caught in the top of the automobile, with the effect, not of throwing the horse down, but of turning him around with the automobile. At the instant of contact the plaintiff Keeney turned his wheel and put on his brakes so suddenly as to stall his engine, and the automobile started skidding the other way, stopping finally across the south bound or westerly track with

the front facing the west, and with the head of the horse caught in the top of the automobile and the horse alongside of it and facing east. As the automobile stopped the top collapsed, covering the sides and the tonneau and also falling down upon the front seat. The collision did not jar or otherwise affect Keeney, nor did it damage the automobile beyond a few scratches. The horse followed the automobile around, taking the wagon with him, but the latter was not overturned or its contents disturbed in any way. Just before this accident the speed of the automobile did not exceed fifteen miles per hour. At the instant of contact with the team the speed was about six miles an hour. As soon as the automobile came to a stop the plaintiff Keeney crawled out from under the front rib of the top, which was over the back of the front seat, and got out on the left or southerly side of the automobile. He saw that the top was down over the sides of the car, blocking egress through either tonneau door. He tried the left door but was unable to open it because of the position of the top, and upon going around the rear of the automobile he saw that the right door was in the same condition. At that instant he noticed up the track to the north the glare of the headlight of an approaching electric car south bound, the car then being distant over a quarter of a mile. Calling to Renard and the driver of the horse to look out for the car, he at once started running up the south bound track toward the oncoming electric car. As he got into the glare of the headlight he held up his arms and waved them. He ran a distance of about one hundred and seventy-five feet from the automobile and then was obliged to step to one side to avoid being run over. The car approached without slackening its speed and passed him while moving at a rate of at least thirty-five to forty miles an hour. As it passed he stood on the travelled way waving his hands. He immediately started back after the car and had gone a few feet when the collision with the automobile occurred, the car carrying the automobile down the track a considerable distance, and the crash being very severe. After the collision the car and the automobile were found to be locked together with the wagon between them in a totally demolished condition. The tonneau of the automobile was practically destroyed. Upon examination it was found to be empty and the plaintiff Renard was discovered lying

unconscious in the snow close to the front steps of the car on the left side.

At the close of the plaintiffs' evidence, the judge ordered a verdict for the defendant in each case, with a stipulation of the parties that, if the ruling of the judge in ordering verdicts for the defendant was wrong, judgment should be entered for the plaintiff Keeney in the sum of \$750 and for the plaintiff Renard in the sum of \$2,000; and that, if the ruling of the judge was right, judgment should be entered on the verdicts. The plaintiffs alleged exceptions, which were allowed by the judge subject to this stipulation.

The cases were submitted on briefs.

D. E. Leary, E. W. Beattie, Jr., & G. D. Cummings, for the plaintiffs.

H. W. Ely & J. B. Ely, for the defendant.

SHELDON, J. Apparently it was not disputed that the plaintiffs' automobile was duly licensed in Connecticut, that they had violated none of the requirements of our statute then in force (St. 1909, c. 534, §§ 3, 10), and that they were rightfully operating their machine in this Commonwealth. The rule stated in *Chase v. New York Central & Hudson River Railroad*, 208 Mass. 137, 156, and the cases there cited, has no application here.

The jury could have found that the accident was due to negligence of the defendant's motorman in driving his car at an excessive rate of speed, in failing to observe Keeney as the latter ran up the track towards the car waving his hands and trying to attract the motorman's attention, and in not stopping his car in season to avoid running into the automobile. This is too obvious to require prolonged discussion or reference to many decisions. See *Lawrence v. Fitchburg & Leominster Street Railway*, 201 Mass. 489, 498. The cases must turn upon the question whether there was evidence that the plaintiffs were in the exercise of due care.

In our opinion there was such evidence. The fact that their machine had been thrown across the defendant's track in consequence of a collision with a horse and wagon is not decisive against them. Keeney, who was driving the automobile, had seen a light ahead of him and thought that it was on the rear of

a vehicle going in the same direction with himself. If this had been so, his turning to the left to go around it would have been proper. R. L. c. 54, § 2. Nor was his mistake necessarily due to negligence. The night was dark; a little snow was falling. It was for the jury to say whether his mistake showed negligence. When he discovered his mistake, it was for the jury to say whether he acted with due care in trying to avoid a collision by turning sharply to the left; and the same is true of all his management of the automobile until it came to a standstill upon the defendant's track. Nor did he then, like the plaintiff in *Lawrence v. Fitchburg & Leominster Street Railway*, 201 Mass. 489, rely solely upon the vigilance and diligence of the motorman. According to his own testimony, he ran toward the approaching car over a distance of nearly two hundred feet in an effort to warn the motorman and avert a collision which could be avoided only by a timely stopping of the car. We think it manifest that the issue of his due care was for the jury.

Renard's due care was also for the jury to determine. We cannot say that any conduct of his contributed to the happening of the accident. Whether he ought to have warned Keeney before the collision with the horse and wagon, and whether he made proper efforts to get out of the automobile after the top had shut down upon him, were questions of fact upon which we cannot pass.

As the only question raised is whether the cases should have been submitted to the jury, we need not consider whether any negligence of Keeney, if such had been found, would have been imputed to Renard also, and so would have barred a recovery by either plaintiff.

In neither of these cases should a verdict for the defendant have been ordered. It follows, under the stipulations, that judgment must now be entered in favor of Keeney for \$750 and costs and in favor of Renard for \$2,000 and costs.

So ordered.

ELIZA H. PHELPS vs. BERKSHIRE STREET RAILWAY COMPANY.

Berkshire. September 25, 1911. — October 16, 1911.

215-2182

Present: RUGG, C. J., HAMMOND, BRALEY, & SHELDON, JJ.

Trespass, Quare clausum fregit. Mortgage, Of land. Damages, In tort.

If the holder of a second mortgage on certain land knows that a street railway corporation, with the consent of the owner of the equity of redemption, has erected poles on the land and has strung wires on the poles for the transmission of a current of electricity, and, rightly or wrongly supposing that the consent of the owner of the equity of redemption gave the corporation the right to do this, takes no step to prevent it, and afterwards the second mortgagee acquires by foreclosure an absolute title to the land superior to any right derived from the owner of the equity of redemption, he may demand the removal of the poles and wires, and, if this request is refused, he can recover against the corporation in an action in the nature of trespass *quare clausum fregit* for the continued maintenance of the structures.

In an action in the nature of trespass *quare clausum fregit* by the owner of a farm, on which he lives with his family, against a street railway corporation, for the wrongful maintenance on the plaintiff's land of poles and guy wires supporting wires transmitting a powerful current of electricity from a power house of the defendant, the character of the defendant's structures and of its acts in sending a dangerous current of electricity over the plaintiff's land are proper matters for consideration by the jury in the assessment of damages.

TORT in the nature of trespass *quare clausum fregit* for the alleged unlawful maintenance of poles, wires and fixtures upon the plaintiff's land at Williamstown for conducting a high voltage electric current from the defendant's power station in the town of Adams to Pownal in the State of Vermont. Writ dated November 29, 1909.

In the Superior Court the case was tried before *Crosby, J.* It appeared that the land in question was a farm belonging to the plaintiff, on which she lived with her husband and family and which was carried on by her husband; that on May 11, 1906, the plaintiff, being then the owner of the land, gave a deed of it to one Farnum, and took back from him a second mortgage, covering all the land conveyed, to secure the purchase price; that on July 30, 1906, Farnum gave to the Hoosac Valley Street Railway Company, of which the defendant was the successor, a deed of the right "to erect and maintain its lines of high tension wires, together with the necessary poles, wires and fixtures over,

across and upon " the land in question ; that the poles, guy wires and high tension electric wires were erected on the land shortly after this deed was given ; that on July 1, 1908, the plaintiff foreclosed the mortgage given by Farnum and acquired title to the land ; that very shortly thereafter the plaintiff gave a notice to the defendant objecting to the poles and wires and requesting their immediate removal ; but that the defendant never had removed the structures as requested.

The plaintiff's husband in answer to the question " What is the effect on the land of these poles and guy wires being located on it ? " testified as follows : " Why, they are in the way all the time. You can't get very near them. These guy wires are in your way, and you can't mow round them nor get to them, and where they run through the orchard, we can't pick the apples under them, and the trees seem to be dying under them. I don't know whether they affect it, but there is something wrong there since the poles come. And you are all the time scared to death for fear you will get hurt with them, and if my family is in the garden to work they are afraid of them. One got down once and set the grass afire and it frightened us."

At the close of the evidence the defendant asked the judge to rule that upon all the evidence the plaintiff was not entitled to recover. The judge refused to make this ruling and submitted the case to the jury.

Upon the question of damages, the judge among other instructions gave the following : " It appears from the evidence here, and is undisputed, both that these wires are maintained there for the purpose of carrying and have carried a high current of electricity, which current is being used for the running of cars between Adams and Bennington in the State of Vermont. They are high voltage or high tension wires, as they are called. They are wires which we all know if a person comes in contact with them, it may be attended with very serious consequences. So, too, in considering the damages, the jury should take into account the way in which these wires are put up on the premises and the effect, if any, of the electricity which is carried on the wires upon the trees in the orchard, any injury that there may be to them, and any danger, if there is any danger, by coming in contact with the wires in the gathering of the crops which the

plaintiff may have to gather from time to time, including the apples as well as the crops grown on the land. . . . The plaintiff would be entitled to have you consider as an element of damages any real tangible danger, if any, that exists which impairs or hinders her right to use, cultivate and work the land for any purpose for which the land is reasonably adapted or suited." The defendant excepted to that part of the charge "which refers to the danger in the use of the land being regarded as an element of damage in any aspect of this case."

The jury returned a verdict for the plaintiff in the sum of \$150; and the defendant alleged exceptions.

The case was submitted on briefs.

H. W. Ely & J. B. Ely, for the defendant.

J. F. Nozan & M. L. Eisner, for the plaintiff.

SHELDON, J. 1. The plaintiff's knowledge that the defendant had entered this land and put up poles and strung wires thereon is not necessarily fatal to her maintenance of the action. She was then merely a second mortgagee of the premises, and rightly or wrongly supposed that the consent of the owner of the equity of redemption gave the defendant the right to do what it did. But this did not authorize the defendant, after the plaintiff's superior title had become absolute, to maintain its structures upon her land without her consent and against her prohibition. For such maintenance and the continued use of the poles and wires for the transmission of an electric current over the land after her request for their removal the plaintiff can maintain an action of trespass *quare clausum*. She does not recover for the original entry and erection of the poles and wires, but for their wrongful maintenance and use in defiance of her request. This was the point decided in *Benjamin v. American Telephone & Telegraph Co.* 196 Mass. 454. The case is not like *Beers v. McGinnis*, 191 Mass. 279, or *Fenner v. Sheldon*, 11 Met. 521, relied on by the defendant.

2. The instructions as to the measure of damages were correct and well guarded. The action was for the wrongful disturbance of the plaintiff's possession; and the character of the defendant's structures and of its acts in sending a dangerous current of electricity over her land was material to be considered. *Hunter v. Farren*, 127 Mass. 481, 484. *French v. Connecticut River Lum-*

ber Co. 145 Mass. 261. *Pye v. Faxon*, 156 Mass. 471, 474. See the discussion as to proximate and remote damages in *Leavitt v. Fiberloid Co.* 196 Mass. 440, 446, *et seq.*

8. The other exceptions have not been argued, and we treat them as waived.

Exceptions overruled.

WILLIAM GOULDING vs. EASTERN BRIDGE AND
STRUCTURAL COMPANY.

Worcester. October 2, 1911. — October 16, 1911.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DECOURCY, JJ.

Negligence, Employer's liability.

A workman, whose duty it is to oil the shafting in a factory and who knows and appreciates the obvious danger of an injury caused by his clothing catching on a revolving shaft, cannot recover against his employer for an injury thus caused; and the facts that there were currents of air and a lack of light at the place where the accident occurred and that the shaft had an accumulation of rust upon it, although they enhanced the risk, do not affect the workman's assumption of it, if he was fully aware of these obvious conditions.

DECOURCY, J. This was an action of tort to recover damages for personal injuries sustained by the plaintiff while working for the defendant near a revolving shaft. The shaft extended north and south in the peak of a building, on a level with the west eaves and seventeen feet five inches from the ground. Parallel to the shaft and about eight and one quarter inches below it were two eight inch planks, securely fastened, which served as a walk on either side of the shafting, the upper right hand corner of the westerly plank being twelve and three quarter inches from the shaft. There was a large beam twenty-five inches below but not parallel with the planks. In getting to the plank walk for the purpose of oiling the shafting the plaintiff went up a stationary ladder to the beam and climbed upon the plank, returning to the floor by the same route.

The plaintiff was eighteen and one half years of age at the time of the accident. He had worked for the defendant several months, first in the blacksmith shop helping his father as a

striker and using the drilling machines, and later in its machine shop operating a lathe. For four or five weeks before the accident one of his duties was that of oiling the shafting in different parts of the defendant's plant. He first was sent with a fellow workman, who took him through the buildings and oiled the boxes but gave him no oral instructions. After the first time the plaintiff himself oiled all the shafting in the mill. For three or four weeks he had oiled the shaft on which he was injured every Monday morning after the works were started up, and had gone to his work and come down the same way. This shaft was two inches in diameter and revolved one hundred and sixty-five times per minute. The plaintiff testified that it was red and rusty, that there was a strong draft around there, that it was neither light nor dark but one could just see what he was doing, and that he was always looking out not to get too near the shaft because he knew that if he did he might get caught.

The only witness to the accident was the plaintiff. He testified that he drew himself up to the plank walk at about ten minutes past seven after the machinery was started, and oiled the boxes along the shaft to the south end of the building; that he walked back and when a couple of feet from the first box started to come down; that he had not used any waste, but had some pushed down in his pocket, without any ends hanging out. "When I got on my knees . . . and as I was turning around to reach to put my hand on the plank, side of the belt . . . I just turned around on my right hip, and was going to put my foot down below, when I felt something pull, from the shafting; it was pulling right here (indicating the location of the right hand pocket of overalls). I don't remember what happened after that."

The action was at common law. The declaration alleged that the defendant was negligent, (1) in setting the plaintiff to work in a dangerous and unsafe place, of which danger the defendant knew and the plaintiff was ignorant; and (2) in failing to give the plaintiff reasonably safe and proper instructions. A verdict for the defendant was directed by the judge.*

This is a harsh case, but we are unable to distinguish it in

* *King, J.*

principle from the numerous ones already decided in this Commonwealth concerning injuries to employees caused by revolving shafting. The danger that the plaintiff's person or clothing or the waste in his overalls pocket might come in contact with the open and visible shaft, while he was getting down from the plank walk near by, was an obvious one. It was attendant upon the use of machinery of a permanent character as it existed when the plaintiff entered into his contract of employment. Not only was the danger so apparent to one of his age, capacity, and experience that in the exercise of reasonable care he must be presumed to know and appreciate it, but the evidence shows that he had actual knowledge of it. The accident was not due to any danger known to the employer and of which the workman was ignorant. Nor had the defendant reason to anticipate that the plaintiff needed instruction or warning to avoid coming in contact with the revolving shaft. There was no evidence to warrant a finding that the accident was caused by the failure of the defendant to perform a legal duty. *Lemoine v. Aldrich*, 177 Mass. 89. *Demers v. Marshall*, 178 Mass. 9. *Daniels v. New England Cotton Yarn Co.* 188 Mass. 260. *Mutter v. Lawrence Manuf. Co.* 195 Mass. 517.

The plaintiff seeks to take his case out of the long established rule by testimony to the effect that there were currents of air and a lack of light in the gable where the accident happened. But these conditions were obvious and the plaintiff's testimony shows that he was fully aware of them. In this respect the case is more favorable to the defendant than such cases as *Ford v. Mount Tom Sulphite Pulp Co.* 172 Mass. 544, *McKenna v. Gould Wire Cord Co.* 197 Mass. 406, and *DeAngelo v. Boston Elevated Railway*, 209 Mass. 58.

Nor does the accumulation of rust upon the shaft distinguish this case from many earlier ones. It merely enhanced the risk of an obvious danger. And unlike many of the set screw cases, the plaintiff here knew of the presence of the increased danger. *Carey v. Boston & Maine Railroad*, 158 Mass. 228, 231. *Connelly v. Hamilton Woolen Co.* 163 Mass. 156, 157. *Tiffany v. Hathaway, Soule & Harrington*, 182 Mass. 431, 433.

There remain exceptions to the exclusion of three questions asked of the expert witness. These might be disposed of on the

ground that it does not appear what answer would have been given, as no offer of proof was made. But aside from this, the judge might well exclude them as not calling for any expert knowledge possessed by the witness, or on the broader ground that, so far as not matters of common knowledge, they were immaterial to the real issue in the case. *Gilbert v. Guild*, 144 Mass. 601. *Connelly v. Hamilton Woolen Co.* 168 Mass. 156, 157.

Exceptions overruled.

M. M. Taylor, for the plaintiff.

C. C. Milton, (*F. L. Riley* with him,) for the defendant.

FRANK A. LEAVITT & another vs. MITCHEL K. MAYKEL
& another.

Worcester. October 2, 1911. — October 16, 1911.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DECOURCY, JJ.

Landlord and Tenant. Waiver. Evidence, Presumptions and burden of proof.

In an action for rent against an alleged tenant at will, where it appears that the defendant occupying the premises after the expiration of a lease became a tenant at will, but, supposing himself to be only a tenant at sufferance, gave no notice under R. L. c. 139, § 12, to terminate the tenancy, and the defendant relies on the acts of the parties as constituting a surrender of the premises by him and their acceptance by the plaintiff, the burden is on the defendant to establish a waiver by the plaintiff of the notice required to terminate the tenancy at will.

In an action for rent against an alleged tenant at will, it appeared that the defendant after the expiration of a lease of the premises from the plaintiff to him, continued to occupy the premises, making monthly payments of rent at the rate prescribed by the lease which were accepted by the plaintiff, that the plaintiff thought that the defendant had become bound by an extension of the lease under its terms and the defendant thought that he was a mere tenant at sufferance. While this state of affairs existed the defendant ceased to occupy the premises and gave the key to the plaintiff with a letter informing him that the defendant was moving out. The plaintiff replied by a letter informing the defendant that the plaintiff looked to him to pay the rent for the extended term mentioned in the lease, saying, "If you wish us to find a tenant who will take the premises off your hands we will try to do this for you, but we do not accept from you any surrender of the premises, and we shall look to you for our rent in any event. The key which you have sent us we hold subject to your order, and the premises are at your disposal." Later an agreement in writing was signed by the defendant and was delivered by him to the plaintiff,

in which, after referring to the plaintiff as the lessor and to the defendant as the lessee, the defendant agreed that the occupation of the premises by any one other than the lessee should not be considered in any way as affecting the question of any surrender of the lessee's interest in the lease and should not be construed in any way by the lessee as a giving up or surrender of any rights which the lessor might have under the lease against the lessee. Relying on this agreement, the plaintiff took possession of the premises and let them to a tenant for two months, after which they were vacant until by a decision of this court the parties learned that the lease had not been extended but that the defendant by occupying the premises after the expiration of the lease and paying a monthly rent in accordance with its provisions had become a tenant at will of the plaintiff. Thereupon the defendant, reserving all rights, gave a notice under R. L. c. 129, § 12, to terminate any tenancy at will that might exist. The plaintiff sued for the rent of the intervening months, crediting the two months' rent received by him from the tenant mentioned. The defendant contended that the tenancy at will was terminated by his surrender of the premises and their acceptance by the plaintiff. *Held*, that the refusal of the plaintiff to accept a surrender of the premises was not deprived of its effect by the plaintiff's mistaken belief that the defendant was held under an extension of the lease, and that the plaintiff by taking possession of the premises in reliance upon the defendant's agreement and by receiving the two months' rent which he credited to the defendant did not waive any rights against the defendant; and consequently that the defendant was liable to pay rent as a tenant at will until such tenancy was terminated by a notice under R. L. c. 129, § 12.

CONTRACT, against two defendants doing business under the name of the Worcester Dry Goods and Wrapper Company, for rent of a store numbered 192 on Front Street in Worcester at \$112.50 a month for the nine months from April to December, 1909, inclusive. Writ dated January 5, 1910.

The answer, after a general denial, set up the defense that the plaintiffs had waived their rights under the contract alleged in the declaration; that on March 20, 1909, the defendants had surrendered the premises to the plaintiffs and that the plaintiffs had accepted such surrender. There was also an allegation of payment.

In the Superior Court the case was submitted to *Fox, J.*, upon an agreed statement of facts.

A previous action between the same parties was brought on March 12, 1909, upon a covenant in a lease for rent of the premises for the months of February and March, 1909. By a decision of this court, reported in 203 Mass. 506, it was held the plaintiffs could not recover upon the covenant, although it was said that upon a proper declaration they might have recovered from the defendants as tenants at will for the rent due and

unpaid after the expiration of the lease there in question. After that decision the plaintiffs amended their declaration in the previous action and declared for rent for the same two months of February and March, 1909, basing their claim in the amended declaration upon an alleged tenancy at will. That case was settled by a payment by the defendants to the plaintiffs of \$225, the amount claimed in the amended declaration as rent for the months of February and March, 1909.

The agreed statement of facts set forth in the bill of exceptions in the former case was incorporated by reference as a part of the agreed statement of facts in the present case. The agreed facts in the former case included the following :

The lease was for the term of two years from the first day of June, 1906, the rent being \$1,350 per year, payable in equal monthly payments in advance "on the first day of each and every month hereafter in every year during said term and at that rate for such further time as the said lessees, or any other person or persons claiming under them, shall hold the premises or any part thereof, the first monthly payment to be made on the first day of June, 1906, now next ensuing."

The lease contained the following clause: "It is further agreed in consideration hereof the lessees shall have the privilege and right to renew this lease at its expiration for further term of two years upon the same terms and conditions of this lease."

The defendants occupied the premises and paid rent therefor at the rate specified in the lease. No new or additional agreement, either written or oral, was made between the parties at the expiration of the two years on May 31, 1908, or at any other time. The lessees, after May 31, 1908, paid the same rent, \$112.50 per month in advance, up to and for the month of January, 1909.

On January 28, 1909, the defendants sent the plaintiffs the following letter: "Worcester, Mass., Jan. 28, 1909. Mr. Frank A. Leavitt, 597 Washington St., Boston, Mass. Dear Sir: Since the expiration of our lease of the store of No. 192 Front St., City, we have continued to occupy the same at sufferance hoping to find something more suited to our purposes. We have now done so and are moving out. We herewith send you the keys of the premises and as we have paid our rent in

advance to February first, we have fulfilled our obligation to you. We wish to thank you for your courtesy in our business relations, and beg to remain, very truly yours, Worcester Dry Goods and Wrapper Co., by M. K. Maykel."

On February 2, 1909, the plaintiffs answered by a letter, addressed to the defendants and signed by the plaintiffs, as follows:

"Your letter of Jan. 28th, 1909, addressed to Mr. Frank A. Leavitt, enclosing key of premises No. 192 Front St., has been handed to us.

"We think you are under a misapprehension as to the terms under which you have been occupying the premises No. 192 Front St., in Worcester.

"The lease under which you were placed in possession of the premises was for the term of two years from the first day of June, 1906, with the privilege and right to renew the lease at its expiration for the further term of two years upon the same terms and conditions.

"Since you kept possession of the premises after the expiration of the first term of two years mentioned in this lease, we concluded that you had availed yourself of your privilege to renew, and we therefore look to you to pay the rent for the second term of two years mentioned in that lease.

"If you have removed your business from the premises it will be necessary for us to have a key in order that we may enter on the premises to take care of steam pipes which may freeze and other matters. If you wish us to find a tenant who will take the premises off your hands we will try to do this for you, but we do not accept from you any surrender of the premises, and we shall look to you for our rent in any event. The key which you have sent us we hold subject to your order, and the premises are at your disposal."

On February 4, 1909, the defendants wrote to the plaintiffs insisting on the position taken in their letter of January 28, and stating that they on that day had surrendered the premises and had no further connection with them.

The following additional facts were agreed in the present case:

The plaintiffs had the keys to the premises on and after Janu-

ary 28, 1909, and the defendants never were upon the premises or exercised any control over them after that time. The plaintiffs found it necessary to enter on the premises to take care of "steam pipes and other matters."

On March 20, 1909, while the first action was pending in the Superior Court, the defendants gave the plaintiffs the following agreement:

"It is hereby agreed by M. K. Maykel and A. Aboumrad, both of the city and county of Worcester and Commonwealth of Massachusetts, doing business in said city and county of Worcester as the Worcester Dry Goods & Wrapper Company, lessees named in a certain lease, dated February 21, 1906, in which Frank A. Leavitt and Chauncey W. Henry, both at that time of the city and county of Worcester and Commonwealth of Massachusetts, doing business in said Worcester as C. W. Henry & Company, are named as lessors, which lease demises a certain store on Front Street in said Worcester, being numbered 192 on said street, and also the basement under said store, except such portion thereof as is now occupied by the bowling alleys used and controlled by the said lessors, that the occupation of said premises by any one other than the lessees shall not be considered in any way as affecting the question of any surrender of their interests in the lease on the part of the lessees, and shall not be construed in any way by the lessees as a giving-up or surrender of any rights which the said lessors may have under said lease against the said lessees." This was signed in the names of the defendants by their attorneys.

Immediately after the giving of the foregoing agreement by the defendants, the plaintiffs, relying upon it, entered on the premises and took possession of them, put up "to rent" signs in the windows and succeeded in letting the premises to one Seiman who occupied them under an agreement with the plaintiffs for the months of June and July, 1909, paying for them \$125 per month or \$250 in all, which was credited to the defendants upon the account annexed in the plaintiffs' declaration. There was no other agreement with the defendants except that above set forth as to the use of the premises by the plaintiffs or any one else.

No demand for rent or for payment for use and occupation

for the months from April to December, 1909, ever was made upon the defendants, nor was any assertion made that they were tenants at will until after the decision in the former case reported in 208 Mass. 506, which was rendered on November 22, 1909.

On December 1, 1909, the defendants gave the plaintiffs the following notice:

“ Worcester, Mass., December 1, 1909.

“ Frank A. Leavitt & Chauncey W. Henry, doing business as
C. W. Leavitt & Co.

“ Gentlemen:

“ Without admitting any liability for back or future rent but to protect our rights under any contingency, you are hereby notified that we shall on the first day of January, 1910, quit and deliver up the premises either now or formerly held by us as your tenants at No. 192 Front Street in the city and county of Worcester and Commonwealth of Massachusetts.

“ This notice being given to make sure the termination of an alleged tenancy at will of said premises, which tenancy is denied by us. And this notice is given with the express reservation of all our legal rights and defenses to any suit which may be brought by you for use and occupation or other kind of action upon our relations the one to the other.”

The notice was signed in the names of the defendants by their attorneys.

Before bringing this action in January, 1910, the plaintiffs demanded of the defendants the sum of \$762.50, for nine months' rent from April to December, 1909, inclusive, at \$112.50 a month, less \$250 paid to the plaintiffs by Seiman.

It was stipulated that the court might draw any proper inference of fact from the agreed facts.

The defendants asked the judge to make the following rulings:

“ 1. When the plaintiffs ‘took possession’ of the premises on March 20, 1909, the tenancy at will of the defendants terminated.

“ 2. That when the plaintiffs, on March 20, 1909, entered on the premises and took possession of them, put up ‘to-rent’ signs and actually rented them to other parties as their tenants the tenancy at will of the defendants terminated.

“ 3. That the agreement of March 20, 1909, preserved to the

plaintiffs any rights they might have against the defendants under the written lease, but left the question of the termination of the defendants' tenancy at will unaffected.

"4. That when the plaintiffs, on March 20, 1909, entered on the premises and took possession of them, put up 'to-rent' signs and actually rented them to other parties, they elected to rely on any rights they might have against the defendants under the written lease, and any tenancy at will of the defendant ended.

"5. That the plaintiffs could not take actual possession of the premises and exercise dominion over them, without terminating defendants' tenancy at will, except by consent of defendants, and defendants did not so consent.

"6. That upon the agreed statement of facts the plaintiff cannot recover."

The judge refused to make any of these rulings, and made the following memorandum of decision: "I am unable to find in the present case that the landlord intended to accept the tenant's surrender of his estate. The landlord took possession relying upon his agreement with the tenant. Although the agreement refers in terms only to the rights of the parties under the written lease, it excludes the inference that the landlord intended by his acts to put an end to the tenant's estate."

The judge found for the plaintiffs in the sum of \$762.50; and the defendants alleged exceptions.

The case was submitted on briefs.

C. H. Wood & C. W. Wood, for the defendants.

G. S. Taft, G. R. Stobbs & L. E. Felton, for the plaintiffs.

DECOURCY, J. The lease to the defendants expired on May 31, 1908. They continued to occupy the premises until January 28, 1909, paying the rent monthly in advance. Acting under the impression that they were only tenants at sufferance after the termination of the lease, they gave no written notice to end their tenancy under R. L. c. 129, § 12, that affects the period covered by the declaration. It was pointed out in the earlier case between the same parties that the defendants became tenants at will. As such they remained liable for rent unless the required statutory notice was waived by the landlord. *Taylor v. Tuson*, 172 Mass. 145. *Leavitt v. Maykel*, 203 Mass. 506.

The defendants contend that the tenancy was terminated by their surrender of the premises and the acts of the plaintiffs operating as an acceptance. The burden of establishing a waiver of the notice is upon the tenant. *Whitney v. Gordon*, 1 Cush. 266. We are unable to find that the landlord, expressly or by implication, accepted the surrender of the estate. The plaintiffs, in their letter of February 2, 1909, expressly stated that they did not accept any surrender and that the premises were at the disposal of the defendants. This claim is not deprived of its effect by the landlords' mistaken opinion that the holding over by the tenants constituted a renewal of the lease. Nor did the occupancy of the store by Seiman during June and July operate to put an end to the defendants' estate under the facts in this case. In their letter of February 2, the plaintiffs expressly stated: "If you wish us to find a tenant who will take the premises off your hands we will try to do this for you, but we do not accept from you any surrender of the premises, and we shall look to you for our rent in any event." They made no attempt to rent the store until the defendants gave them the agreement of March 20, 1909, when the earlier case was pending. This agreement indicates that the plaintiffs did not intend to waive their legal claim against the defendants by taking possession. And the defendants were credited with the rent received from Seiman.

We are constrained to hold that the tenancy at will was not terminated and that the defendants are liable for the rent declared on. The rulings requested were rightly refused. *Talbot v. Whipple*, 14 Allen, 177. *Fifty Associates v. Grace*, 125 Mass. 161, 163. *Whicher v. Cottrell*, 165 Mass. 851.

Exceptions overruled.

MARY LEMAY vs. SPRINGFIELD STREET RAILWAY COMPANY.

TWILLA LEMAY vs. SAME.

PHILLINESE RATELLE vs. SAME.

Hampden. October 3, 1911. — October 16, 1911.

211-733
 5211-138
 241-1564
 249-142
 253-2531

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DECOURCY, JJ.

Negligence. Street Railway. Pleading, Civil, Declaration. Practice, Civil, Exceptions, Amendment.

In an action against a street railway corporation by a passenger alleged to have been thrown from a car of the defendant by reason of its excessive speed in going around a sharp curve of the track, if it appears that when the car was approaching the curve and was near it the air brake failed to work and that the motorman did not use a hand brake which he might have used but tried unsuccessfully to stop the car by reversing the power, although allowance must be made for the motorman being compelled to act immediately, the sudden emergency does not necessarily excuse his error of judgment, and the question to be determined by the jury is whether, when confronted with unexpected peril, he acted with proper diligence under the circumstances then existing and with the light he then had.

In an action against a street railway corporation for personal injuries from being thrown from a car of the defendant at a sharp curve of the track, the only allegation of the defendant's negligence contained in the declaration was that the defendant had "so carelessly, negligently and recklessly operated" its car as to cause it to approach and go around the curve at a very high and dangerous rate of speed, causing the injuries complained of. There was evidence that when the car approached the curve the air brake of the car failed to work. The defendant asked the judge to rule that the plaintiff could not recover for any defect in the car causing the accident or for a failure to inspect the car, and excepted to a refusal of the judge to make these rulings. The bill of exceptions, allowed after a verdict for the plaintiff, indicated that the defendant was heard fully upon the questions of its liability for a defect in the car or for a failure to inspect it properly, and that the case was submitted to the jury fairly upon those issues as well as upon the issue raised by the pleadings. *Held*, that as the declaration stood at the trial the instructions requested by the defendant should have been given, but, as upon a proper declaration the defendant would have been liable if the accident was caused by a defect in the car which by proper inspection might have been discovered and remedied, and as the case appeared to have been submitted to the jury fairly on this question, an amendment of the declaration so as to present this issue would cure the error without resorting to a new trial which justice did not require, and accordingly it was *ordered*, that, if the plaintiff should be allowed by the Superior Court within sixty days from the filing of the rescript to amend his declaration in the manner indicated, the defendant's exceptions were to be overruled; otherwise, that they must be sustained.

THREE ACTIONS OF TORT for personal injuries sustained on August 10, 1909, by being thrown from an open electric car of the defendant in which the plaintiffs were being transported as passengers. Writs dated September 16, 1909.

The declaration in each of the three cases was the same, and was as follows:

"And the plaintiff says that the defendant was on or about the tenth day of August, 1909, and now is a corporation operating a street railway between the cities of Springfield and Chicopee in said county and that on said day she was a passenger on one of the defendant's street cars en route from Springfield to Chicopee; that it thereupon became and was the duty of the defendant to carry her safely to her destination on its route and then to permit her to leave said car in safety; yet the defendant by its servants, agents and employees, wholly regardless of said duty, so carelessly, negligently and recklessly operated said car as to cause the same to approach and go around the curve of its track at the corner of Grape and Front streets in said Chicopee at a very high and dangerous rate of speed, causing said car to jolt and sway with the greatest violence and throwing the plaintiff who was seated therein, and who herself was using due care, with violence to the ground, that as a result the plaintiff was severely and permanently injured and has suffered and is still suffering great pain of mind and has sustained other damage."

In each case the answer was a general denial.

In the Superior Court the cases were tried together before *Crosby, J.* It appeared that the accident happened at about nine o'clock in the evening; that the car was late about four minutes; that it was equipped with an air brake and a hand or emergency brake; and that connected with the air brake at each end of the car was a pressure gauge.

Evidence was introduced by the plaintiffs which tended to show that the car on which the plaintiffs were passengers had been running very fast along Springfield Street before reaching Grape Street; that while running down the grade on Grape Street it attained a very high rate of speed and rocked and swayed with much violence; that it made no stop on Grape Street; that while approaching a curve at the foot of the grade

on Grape Street and turning into Front Street it was running at a rate of speed variously estimated at from twenty-five to forty miles an hour; that it rounded the curve while moving at a very rapid rate, about twenty miles an hour; that there was a violent lunge of the car as it entered the curve and that the three plaintiffs were thrown to the ground; and that the car rocked and swayed in such a manner as to cause various passengers to become alarmed and to take precautions for their safety. The conductor of the car testified that as the car entered the curve a passenger was thrown up against him as he stood on the back platform, and that this passenger lost his hat. It also appeared that other passengers were thrown about, retaining their positions with great difficulty, and that in some cases their hold on the uprights and seats of the car was loosened. The evidence of the plaintiffs further tended to show that as the car rounded the curve the trolley left the wire and that the car proceeded on to and down Front Street, not stopping until its rear end was at a distance from the curve variously estimated at from eighty to one hundred and fifty feet. It also appeared that the motorman, immediately after the car had stopped, stated that he could not control the car, that the air brake would not work.

A rule of the defendant was introduced in evidence by the plaintiffs which read as follows: "Never run into a sharp curve at a greater speed than four miles per hour. Slacken speed of car when approaching curve so as to enter same with brakes released."

There was no dispute upon the part of the witnesses called by the defendant but that the plaintiffs were thrown from the car; and witnesses called by the defendant estimated that the rate of speed at which the car approached the curve was from eight to twelve miles an hour. Expert witnesses called by the defendant gave it as their opinion that it would be impossible for such a car as was described in this case to take this particular curve at a rate of speed in excess of eight miles an hour and remain upon the track. The evidence showed that the defendant's car at no time left the rail.

Other evidence introduced upon the part of the defendant tended to show that the air brake apparatus gave way without premonition or warning to the motorman; that he endeavored to use the air brake at a distance of about one hundred and fifty feet

from the curve and while running down grade at a rate of from ten to fifteen miles an hour; that the first application checked somewhat the speed of the car; that the second application disclosed to him that the brake utterly failed to work; that he was then at a distance of from ten to twenty feet from the curve at Grape and Front streets and that he reversed his car; that he did not use the hand or emergency brake which after the accident was found to be in good condition; and that the car came to a stop on Grape Street with the rear trucks just leaving the curve into Front Street. Evidence, also introduced by the defendant, tended to show that there had been an inspection of the car the evening before this accident and that this inspection had failed to show any defect in the air brake apparatus or in the wiring of the car, and that the failure of the brake to work was caused by a sudden and unforeseen breaking of the wire transmitting power to the motor which operated the air pump.

At the close of the evidence the defendant made twenty-six requests for rulings, which included the following:

"18. If you should find that the air brake on this car of the defendant failed to work, without premonition or warning to the motorman, and at a time when he was closely approaching a sharp curve in the defendant's tracks, so that he was confronted with unexpected peril, then it is immaterial whether the hand brake was used by him or not, if he used a reasonably proper method for checking the speed of the car."

"25. The plaintiff cannot recover for any defect in the car causing the accident.

"26. The plaintiff cannot recover for failure to inspect the car."

The judge refused to make these rulings, and submitted the case to the jury with instructions which permitted them to find negligence of the defendant, not only in the manner of the operation of the car, but also in operating the car with a defective air brake and in a failure to inspect the car properly.

The jury returned a verdict for the plaintiff in each of the cases; and the defendant alleged exceptions.

The cases were submitted on briefs.

H. W. Ely & J. B. Ely, for the defendant.

D. E. Leary, E. W. Beattie, Jr., & G. D. Cummings, for the plaintiffs.

SHELDON, J. The defendant's eighteenth request could not have been given as framed. It would have excluded from consideration by the jury the question of the motorman's negligence in approaching a sharp curve at an excessive and dangerous rate of speed before he had discovered the failure of his air-brake, and the question whether, if he was confronted with unexpected peril, he acted with proper diligence under the circumstances then existing and with the light that he then had. It is true that allowance must be made for one compelled to act immediately, without opportunity for deliberation, upon a sudden emergency. But this does not mean that he is necessarily excused for any error of judgment, but simply that his conduct is to be judged in view of the exigency and the need of immediate action. He is still bound to use the same degree of care to which he is ordinarily held; but due allowance must be made for the situation in which he is placed, and he is not to be held to a coolness of judgment for which there is not time. *Linnehan v. Sampson*, 126 Mass. 506, 511, 512. *Cody v. New York & New England Railroad*, 151 Mass. 462, 468. *Tosier v. Haverhill & Amesbury Street Railway*, 187 Mass. 179. *O'Brien v. Lexington & Boston Street Railway*, 205 Mass. 182, 184. This is the rule stated in *Brooks v. Petersham*, 16 Gray, 181, 184; and we know of nothing in our decisions to the contrary. While a choice, though mistaken, may yet be prudent (*Kane v. Worcester Consolidated Street Railway*, 182 Mass. 201), this must be determined by the jury and not by the court. The instructions given to the jury upon this question were accurate and sufficient.

But the twenty-fifth and twenty-sixth requests should have been given; for although the defendant would have been liable upon a proper declaration if the accident was caused by any defect in its car which might have been discovered and remedied by proper inspection, yet the declarations in these cases averred merely that the accident was caused by the fact that the defendant had "so carelessly, negligently and recklessly operated" its car as to cause it to approach and go around the curve at a very high and dangerous rate of speed, causing the injuries complained of. This plainly charged only the negligent operation of the car, and not negligence in using a defective or poorly equipped car. The plaintiffs were allowed to recover, and the

verdicts in their favor may have been found, upon an issue which was not open under the pleadings, and which the defendant seasonably requested to have withdrawn from the jury. *Lund v. Tyngsboro*, 11 Cush. 563, 567, *et seq.* *Hanlon v. South Boston Horse Railroad*, 129 Mass. 310. *James v. Boston Elevated Railway*, 201 Mass. 268.

But the bill of exceptions seems to indicate that the defendant was fully heard upon this question, and it was fairly submitted to the jury. It follows that if the plaintiffs' declarations shall be amended so as to present this issue, justice does not demand a new trial. *Denham v. Bryant*, 139 Mass. 110, 112, and cases cited. *Peck v. Waters*, 104 Mass. 345, 351. *Fay v. Walsh*, 190 Mass. 374, 377. *Beers v. McGinnis*, 191 Mass. 279, 282.

The other exceptions have not been argued and we treat them as waived.

If the plaintiffs shall be allowed by the Superior Court within sixty days from the filing of the rescript to amend their declarations as has been stated, the exceptions will be overruled; otherwise, they must be sustained.

So ordered.

MARY E. LEARY vs. WILLIAM G. WEBBER COMPANY.

Essex. November 2, 1910. — October 17, 1911.

Present: RUGG, C. J., HAMMOND, LORING, & SHELDON, JJ.

Negligence, Volenti non fit injuria, Employer's liability. Evidence, Presumptions and burden of proof.

Where, in an action of tort for personal injuries, a defendant, who is shown to have been at fault, sets up the defense of *volenti non fit injuria*, alleging that the plaintiff, knowing of the danger to which his injury was due, voluntarily incurred the risk, this is an affirmative defense, which must be pleaded as such by the defendant, and the burden of proving it is on him.

In an action against the proprietor of a department store by the head fitter in the defendant's cloak and dressmaking department, who had been in the defendant's employ for fifteen or sixteen years, for personal injuries, alleged to have been caused by the defendant's negligence in employing an incompetent person to operate a passenger elevator in the defendant's building, it appeared that the injuries were sustained from the plaintiff being thrown into the elevator well by the starting of the elevator when she was about to enter it and had put

one foot upon it. There was evidence warranting a finding that the servant of the defendant in charge of the elevator was half-witted and childish, that he did not have the mental capacity to run an elevator and that he did not run this elevator properly during the six or seven weeks that he was employed to do so, and there also was evidence warranting a finding that if the defendant had exercised due care he would have known these facts, and consequently that the defendant was negligent in continuing the servant in his employ in charge of the elevator. The plaintiff testified on cross-examination that she had noticed the symptoms of mental deficiency in the elevator boy, that she had ridden with him thirty times in a business day, about one hundred and eighty times a week, and during that time had noticed that the boy could not control the elevator very well and that he could not stop and start it properly, that she had seen him start the elevator improperly by starting it when he ought not to and by starting it before fully closing the door. When asked, on cross-examination, whether she did not know that if the elevator went up without the door being wholly closed there would be nothing to prevent a person on the floor from falling into the well, she answered, "Yes, sir; I knew it, but I didn't think of it in that way," and testified further that "if the boy did not start the elevator properly at the floors there was a chance that somebody would be hurt by falling," and that "there was a probability that owing to this boy not handling the elevator right an accident would be liable to happen . . . to those who were riding with him." The defendant contended that the principle of *volenti non fit injuria* applied, and that the defendant as matter of law could not be held liable because the plaintiff, knowing of the danger, voluntarily incurred the risk of such an accident as happened. *Held*, that it could not be ruled as matter of law that the defendant had made out the affirmative defense of *volenti non fit injuria*, because there was evidence warranting a finding that the plaintiff, although she knew of the incompetence of the elevator boy, did not wholly appreciate the danger arising from it.

TORT, against a corporation maintaining a department store in Salem, by the head fitter in the defendant's cloak and dress-making department, for personal injuries sustained on March 30, 1906, in the course of the plaintiff's employment by the defendant, alleged to have been caused by the negligence of the defendant in employing for the management and operation of a passenger elevator in its building an incompetent person of insufficient mental and physical capacity and skill. Writ dated September 14, 1906.

The answer consisted only of a general denial.

In the Superior Court the case was tried before *Morton, J.* The material evidence is described in the opinion. At the close of the plaintiff's evidence, the judge, in accordance with an agreement of the parties, ordered a verdict for the defendant and reported the case for determination by this court, with the stipulation that, if upon all the competent evidence reported the

plaintiff was entitled to go to the jury, judgment should be entered for the plaintiff in the sum of \$2,500; otherwise, that judgment should be entered for the defendant.

J. P. Sweeney, for the plaintiff.

R. Spring, (*G. E. Kimball* with him,) for the defendant.

LOBING, J. The plaintiff's story in this case was that she had come down on the elevator from the top to the first floor to get a piece of satin. After getting it she returned to go up in the same way and found "the elevator was up." She rang the bell and Kinsman came down with some matting in the elevator. She waited while he took it off, and then (to quote her own words) "I went to get on the elevator and as I put my right foot on the elevator, and before I had a chance to put the left foot on the elevator, it shot up. . . . The next thing I remember [was] hanging on to something; it seemed to me [to be] the bar under the elevator." She testified that she hung on until she got nearly to the second floor, when she let go and fell to the bottom of the elevator pit some three feet below the basement floor.

The accident happened on March 30, 1906. Kinsman testified that he was employed to run the elevator on February 2 of the same year, six weeks and four days before the accident. He was then "about twenty-three years of age," and "left school in June, 1902," when he "was about eighteen," having gone through the grammar school. He testified that he worked in a grocery and bakery for six months, then for a grocer "about a year;" that then he was in the grocery business for himself for a year and a month, then "filled in a vacation time" for two months, then worked for grocers a year and a half, then for the United Shoe Machinery Company for three months, and then for the defendant. He never had run an elevator before and was employed by the defendant at \$5 a week to run the elevator in question.

The plaintiff was the head fitter in the defendant's establishment and had been in their employ for fifteen or sixteen years. She testified that Kinsman "didn't seem to have the control of the elevator that the other boys had, but he seemed to be slower in his movements. . . . When you spoke to him he didn't seem to grasp the meaning of what you said, and then he had rather

a sort of flippant way of answering and stupid way of looking at you, and very often he would laugh when there wasn't anything to laugh at," and that she noticed this right away after he came to work. On being asked what she had noticed in respect to his laughing she testified "Well, for instance, I would say to him, tell Mr. Palmer or tell somebody else something on that floor in regard to a suit and he would look at me and laugh instead of starting and doing it, instead of making some answer he would laugh and many times wouldn't do it." On cross-examination she testified that she rode with Kinsman thirty times a business day, about one hundred and eighty times a week, and during the time that Kinsman was there she had noticed "that he could not control the car, as you [she] thought, very well, . . . that he could not stop and start it properly," and "when you [she] say [says] he didn't run it properly, that was because he didn't seem to have control of it;" that she "had seen him start it and stop it improperly," and "by starting it improperly you [she] mean [meant] start it when he ought not to;" that she had "seen him start the elevator before he would fully close the door." She further testified on cross-examination that she had "been perfectly familiar with elevators for many years, in the sense of riding on them," and "with that elevator;" that she knew that elevators move rapidly and are controlled by a lever; that people enter them through folding doors; that when the door is open that that leaves a space into which one can fall into the well; that she had seen Kinsman start the elevator before he closed the door wholly. In answer to the question "And you knew that if the elevator went up without the door being wholly closed there would be nothing to prevent a person on the floor from falling down the well," she answered, "Yes, sir; I knew it, but I didn't think of it in that way." She further testified that she did know it, and again, in answer to that question she testified that "if the boy did not start the elevator properly at the floors there was a chance that somebody would be hurt by falling;" and that "there was a probability that owing to this boy not handling the elevator right, an accident would be liable to happen," and "happen to those who were riding with him." On re-direct examination the plaintiff testified that she had ridden on the elevator when

members of the "firm" were on it, and once she heard one of the "partners" "reprimand the boy about bringing the elevator even with the floor," and in "one instance he told the boy if he was not careful he would have an accident." On re-cross-examination she testified that she had "seen him [Kinsman] quite a few times reprimanded."

There was corroboration of the plaintiff's testimony as to Kinsman's incompetency. One of the defendant's employees testified that she noticed something about Kinsman that struck her as peculiar and unusual; "he didn't talk as other people would talk. . . . He would talk about things that I didn't understand what he was talking about. He was laughing all the time. He would laugh at things anybody else wouldn't laugh at. . . . I have often seen him going up on the elevator and I would be on the elevator with him and he would be waving his hand to all the girls, some of the girls in the store and sometimes hollering out their names and laughing; and often times telling things that I wouldn't understand what he would be talking about; couldn't understand him; they would have no meaning to them — his words." Another employee testified that "there was something in his manner that struck me as unusual and peculiar, . . . such as laughing and talking foolishly." In answer to the question "What was there to laugh at at the time that he laughed," she testified: "There wasn't anything that I thought was. . . . He seemed frivolous talking. . . . There didn't seem to be any sense to his conversation." After testifying that he stopped and opened the elevator door before getting level with the floor and that he often would start up before closing it, she was asked, "How far up would he go before he closed the door," and she answered, "Well, perhaps sometimes that far (indicating about two feet)," and that she observed that "quite a number of times." On cross-examination this witness testified:

"The boy's talk was frivolous. My objection was not to the boy's talking at all, but that there didn't seem to be any sense to what he said."

Another employee testified that from his observation of Kinsman "he wasn't quick enough, couldn't think quick enough, . . . not quick enough for that place." Another, that "he used to make faces at the girls in the cashier's desk."

There was abundant evidence that by general reputation Kinsman was incompetent. If some of this evidence came within *Driscoll v. Fall River*, 168 Mass. 105, there was much that did not.

At the defendant's request the presiding judge, following the decision in *Hatt v. Nay*, 144 Mass. 186, refused to allow the plaintiff to introduce in evidence specific instances of negligence, and struck out some evidence of that kind which had been admitted. The learned counsel for the defendant insisted that the plaintiff's witnesses should not give their opinions or testify to what they thought about Kinsman, and the presiding judge upheld him in this. The familiar rule which permitted the witnesses to state as matter of observation what they saw about Kinsman that was peculiar or unusual (see *Clark v. Clark*, 168 Mass. 523; *McCoy v. Jordan*, 184 Mass. 575; *Gorham v. Moor*, 197 Mass. 522; *Jenkins v. Weston*, 200 Mass. 488), was explained and acted upon by the presiding judge.

This evidence warranted a finding that Kinsman was half-witted and childish in general; and that in the particular here in question he did not have enough brains to run an elevator; that in fact he did not run the defendant's elevator properly during the six to seven weeks in which he undertook to do so. The further finding was warranted that if the defendant had exercised due care it would have known this. It is possible that the jury might have taken a different view of the evidence. But it was at least possible for the jury to find that Kinsman, in regard to the duties he was employed to perform, was an incompetent servant; that the defendant ought to have known of it and consequently was negligent in continuing him in its employ; and that this negligence was the cause of the injury to the plaintiff. *Cayzer v. Taylor*, 10 Gray, 274. *Gilman v. Eastern Railroad*, 10 Allen, 238; *S. C.* 13 Allen, 438.

The defense set up is the defense of *volenti non fit injuria*. Where a defendant otherwise liable for an injury sets up the doctrine of that maxim, he is setting up an affirmative defense which must be pleaded by him as such, and the burden of proving it is on him.

The question we have to decide is whether on the evidence in this case the jury should have been instructed that the defendant

as matter of law had made out this affirmative defense. There are cases where facts are disclosed by the plaintiff's evidence (introduced to prove his own case) which as matter of law prove an affirmative defense pleaded by the defendant. But such an instance is the exception. The general rule is that it is for the jury to decide whether as matter of fact an affirmative defense has been made out in the evidence. This always must be so where the evidence which is relied on to make out the affirmative defense is introduced by the defendant. For in that case the plaintiff can ask the jury to disbelieve the facts testified to by the defendant's witnesses without introducing any evidence to contradict them. *Lindenbaum v. New York, New Haven, & Hartford Railroad*, 197 Mass. 314.

In our opinion this case comes within the decision made in *Fitzgerald v. Connecticut River Paper Co.* 155 Mass. 155. That case was decided on the ground that the evidence in that case warranted a finding that the plaintiff did not wholly appreciate the risk and for that reason this affirmative defense was not made out as matter of law. There are subsequent cases which have been decided on the same ground. See *Cooney v. Commonwealth Avenue Street Railway*, 196 Mass. 11; *Baldwin v. American Writing Paper Co.* 196 Mass. 402; *Herlihy v. Little*, 200 Mass. 284. We are of opinion that within the decisions in these cases the jury would have been warranted in finding in the case at bar that the plaintiff did not wholly appreciate the risk of Kinsman's incompetence and therefore that the affirmative defense had not been made out as matter of law.

In accordance with the terms of the report the entry must be
Judgment for the plaintiff in the sum of \$2,500.

MAURICE B. FERRON vs. MARY E. KING.

247-494

Plymouth. September 5, 1911. — October 17, 1911.

Present: RUGG, C. J., HAMMOND, BRALEY, & SHELDON, JJ.

Evidence, Remoteness. Negligence, In maintaining real estate.

In an action against the owner of land, on which such owner maintained a store, for personal injuries alleged to have been caused by the unsafe condition of the approaches to the store, the defendant objected to the admission of evidence as to the condition of the approaches six months after the accident. The plaintiff then introduced independent evidence that the condition of the approaches had remained unchanged from the time of the accident to the time of the trial, and offered again the evidence of the condition of the premises six months after the accident, which the presiding judge admitted. *Held*, that the question whether the evidence was too remote was within the discretion of the presiding judge, and that this discretion did not appear to have been exercised wrongly.

In an action against the owner of land, on which such owner maintained a store, for personal injuries alleged to have been caused by the caving in of a dirt walk leading to the door of the store, there was evidence warranting a finding that, for some time before the injury to the plaintiff, the filling was dropping away from the entrance to the store in such a way as might render it dangerous, and that a reasonable inspection would have revealed a defective condition which reasonable prudence required should be remedied. The presiding judge refused to rule that "there was not sufficient evidence for the jury that the defendant knew or should have known by the exercise of due care and diligence that there was any defect in her premises." *Held*, that the ruling was refused rightly.

In an action against the owner of land, on which such owner maintained a store, for personal injuries alleged to have been caused by the caving in of a dirt walk leading to the door of the store, it appeared that the plaintiff had a wooden leg with a flat base about three inches across, that as the plaintiff stepped from the doorway of the defendant's store his wooden leg went through the walk in a slanting way, throwing the plaintiff down and causing his injuries, that the plaintiff for a considerable time had been a regular customer at the defendant's store and that the defendant knew about his wooden leg. The defendant excepted to an instruction to the jury, which was in substance, that they might take into account, as bearing upon the care which the defendant ought to exercise, that the defendant knew of the plaintiff's infirmity and that the plaintiff was in the habit of trading at the defendant's store. *Held*, that the instruction was a proper one; that, if the defendant knew that the plaintiff with his wooden leg was in the habit of resorting to her store as a customer, this was equivalent to an invitation to him to do so, and was a fact to be considered with all the others upon the question whether the defendant had conformed to the required standard of ordinary care.

TORT, against the owner and occupant of certain real estate in Brockton at the corner of North Montello Street and a private

way called King Avenue, for personal injuries alleged to have been sustained by the plaintiff on May 23, 1907, from being thrown to the ground by reason of the caving in of a dirt walk on the land of the defendant, leading from the sidewalk of North Montello Street to a store kept by the defendant in a building on her land, to which the public were invited to resort for purposes of trade. Writ dated January 11, 1908.

A count was added to the declaration by amendment, alleging that the plaintiff was afflicted with an infirmity, consisting of the loss of one of his legs, and used a wooden stump in place thereof, which was well known to the defendant; that the plaintiff was on May 23, 1907, and had been for a long time before, a patron and customer of the defendant's store, as the defendant well knew; whereby it became and was the duty of the defendant to construct and maintain the ways or approaches in such a manner as to make and keep them at all times safe and suitable for the use of the plaintiff as well as of all other persons lawfully using them, but that the defendant wholly neglected this duty.

In the Superior Court the case was tried before *Lawton, J.* The manner of the accident is described in the opinion. The defendant objected to the admission of the deposition of one Lambert, in which he testified that in the autumn of 1907 at the request of the plaintiff he examined the conditions existing about the entrance to the defendant's shop, which he described. The defendant stated that he objected to the deposition on the ground that the deponent examined the premises six months or more after the accident. The plaintiff then called as a witness the defendant's husband, who testified "that he remembered the plaintiff's accident and the time of it, and that" there had been no change around this doorway of the defendant's store "from the time of the accident down to the time of the trial." The plaintiff then renewed his offer of the deposition, and the judge admitted it subject to an exception by the defendant. Before the offering of the deposition of Lambert, testimony had been introduced for the plaintiff tending to show that the plaintiff had been injured, on stepping down from the doorway of the defendant's building upon the walk beneath, by what the plaintiff described as a caving in of the walk toward and under the sill at the doorway of the store kept by the defendant and her husband, and that the building

continued to be used by the defendant and her husband for a store down to the date of the writ.

The jury returned a verdict for the plaintiff in the sum of \$980; and the defendant alleged exceptions. There were three exceptions. The first was to the admission of the deposition of Lambert; the second was to the refusal of the judge to make the ruling which is quoted in the opinion; and the third was to an instruction to the jury which is stated in substance in the opinion.

The case was submitted on briefs.

S. B. McLeod & F. E. Sweet, for the defendant.

R. W. Nutter & C. C. King, for the plaintiff.

RUGG, C. J. The plaintiff had one natural leg and one wooden leg with a flat base about three inches across. As he came out of the defendant's cigar store, where for a considerable time he had been a regular customer, upon the public way, his wooden leg went through the walk, according to some of the evidence, "in a slanting way towards the cellar and partly under the building," and he sustained injuries by reason of which this action is brought.

1. It cannot be said as matter of law that the deposition of Lambert was admitted erroneously. There was ground to support the inference that the condition of the walk and foundation and cellar of the defendant's store at the time of the deponent's observations was the same as immediately after the plaintiff's accident. Whether it was too remote was in the discretion of the trial judge within reasonable limits. This discretion does not appear to have been exercised wrongly. *White Sewing Machine Co. v. Phenix Nerve Beverage Co.* 188 Mass. 407. *Jaquith v. Morrill*, 204 Mass. 181, 191. *Young v. Snell*, 200 Mass. 242.

2. The refusal to rule that "there was not sufficient evidence for the jury that the defendant knew or should have known by the exercise of due care and diligence that there was any defect in her premises" was correct. There was evidence which, if believed, would warrant a finding that for some time before the injury to the plaintiff the filling was dropping away from the entrance to the defendant's store in such a way as might render it dangerous, a situation which reasonable inspection would have revealed, and which when discovered reasonable prudence would

have remedied. In this respect the case is well within *Tilton v. Haverhill*, 203 Mass. 580, where the authorities chiefly relied upon by the defendant are discussed and distinguished by Mr. Justice Loring.

3. The jury were instructed, in language not objected to, as to the general principles which governed the defendant's liability. They were further told, in substance, that they might take into account, as bearing upon the care which the defendant ought to exercise, the fact that she knew of the infirmity of the plaintiff, and that he was in the habit of trading at her store.

The standard of care required of the defendant was that of the ordinarily prudent person in the light of all the circumstances by which she was surrounded. If her premises were frequented to her knowledge for purposes of business by a person afflicted with some limitation of physical powers, that was equivalent to an invitation to him by her, and was a fact to be considered with all the others as bearing upon the question whether she had conformed to the required standard of care. - *Keith v. Worcester & Blackstone Valley Street Railway*, 196 Mass. 478. *Glennen v. Boston Elevated Railway*, 207 Mass. 497, 500.

Exceptions overruled.

COMMONWEALTH vs. SILAS N. PHELPS.

Franklin. September 19, 1911. — October 17, 1911.

Present: RUGG, C. J., HAMMOND, LORING, & BRALEY, JJ.

Constitutional Law, Ex post facto law.

St. 1910, c. 555, § 8, repealing R. L. c. 157, § 8, which provided that capital cases should be tried before two or more judges of the Superior Court, is not an *ex post facto* law as applied to the trial before a single judge of the Superior Court of an indictment for a murder committed before the repeal of R. L. c. 157, § 8.

INDICTMENT FOR MURDER, found and returned on July 12, 1910. The defendant was convicted, and a decision of this court overruling his exceptions is reported in 209 Mass. 396.

The rescript from this court ordering the clerk of the Superior Court to make the entry that the exceptions were overruled was

dated June 21, 1911, and was received and filed in the Superior Court on June 22, 1911.

On July 17, 1911, the defendant filed the following motion in arrest of judgment:

"Now comes the defendant in the above-entitled action and respectfully shows unto the court that on the twelfth day of June, 1910, the time the alleged offense was committed, section 8 of chapter 157 of the Revised Laws was in full force and effect, and required that the trial of capital cases should be held before two or more justices, at a regular or special sitting of the court; that the defendant, by virtue of said statute, was entitled to the judgment and discretion of two justices of the court; that at the trial which was held at the November sitting, 1910, one justice presided, and heard and determined all questions of law, and exercised and determined all questions of discretion, contrary to section 8 of chapter 157 of the Revised Laws.

"Wherefore, the defendant says that he was deprived of the benefit of the provisions of section 8 of chapter 157 of the Revised Laws, and that a single justice of the court did not have jurisdiction to hear and determine the questions of law and to act upon questions of discretion on the trial of the indictment returned against him for murder, and moves that judgment in said action may be arrested."

The motion was heard and denied by *Fessenden J.*, and the defendant appealed from the order denying the motion.

W. A. Davenport, (*H. E. Ward* with him,) for the defendant.

R. W. Irwin, District Attorney, for the Commonwealth, submitted a brief.

LORING, J. The question in this case is whether a statute enacted after the commission of an offense is void as an *ex post facto* law because its effect is to provide that one in place of two or more judges shall preside when the defendant is tried by a jury.

The question thus raised is a question upon which the Supreme Court of the United States is the final authority. The general rule was laid down by that court in *Duncan v. Missouri*, 152 U. S. 377, 382, in these words: "It may be said, generally speaking, that an *ex post facto* law is one which imposes a punishment for an act which was not punishable at the time it was

committed; or an additional punishment to that then prescribed; or changes the rules of evidence by which less or different testimony is sufficient to convict than was then required; or, in short, in relation to the offense or its consequences, alters the situation of a party to his disadvantage; *Cummings v. Missouri*, 4 Wall. 277; *Kring v. Missouri*, 107 U. S. 221; but the prescribing of different modes of procedure and the abolition of courts and creation of new ones, leaving untouched all the substantial protections with which the existing law surrounds the person accused of crime, are not considered within the constitutional inhibition. Cooley, Const. Lim. (5th ed.) 329." And in the subsequent cases of *Thompson v. Missouri*, 171 U. S. 380, 386, and *Mallett v. North Carolina*, 181 U. S. 589, 596, 597, the more particular statement of the general rule originally put forward in Cooley's Constitutional Limitations was approved; "But so far as mere modes of procedure are concerned, a party has no more right, in a criminal than in a civil action, to insist that his case shall be disposed of under the law in force when the act to be investigated is charged to have taken place. Remedies must always be under the control of the Legislature, and it would create endless confusion in legal proceedings if every case was to be conducted only in accordance with the rules of practice, and heard only by the courts, in existence when its facts arose. The Legislature may abolish courts and create new ones, and it may prescribe altogether different modes of procedure in its discretion, though it cannot lawfully, we think, in so doing, dispense with any of those substantial protections with which the existing law surrounds the person accused of crime." See Cooley, Const. Lim. (7th ed.) 381.

It was accordingly decided by the United States Supreme Court, in *Gibson v. Mississippi*, 162 U. S. 565, that a subsequent statute, requiring members of the grand jury to be persons of good intelligence, sound judgment and fair character as well as qualified voters and able to read and write, was not void as an *ex post facto* law; in *Thompson v. Missouri*, 171 U. S. 380, that a subsequent statute, providing that comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine should be permitted to be made by the witnesses and submitted to the jury, was a valid act; and in *Mallett v.*

North Carolina, 181 U. S. 589, that a subsequent act, giving the State an appeal in a criminal case, was not void as an *ex post facto* law. It was held on the other hand in *Thompson v. Utah*, 170 U. S. 343, that the provision of the Constitution of the State of Utah, providing that cases should be tried by a jury of eight, was void as an *ex post facto* law in its application to felonies committed while Utah was a territory.

To come to decisions nearer to the question in the case at bar, it was decided by this court in *Commonwealth v. Phillips*, 11 Pick. 27, that a subsequent statute transferring jurisdiction from the Supreme Judicial Court to the Municipal Court was not void as an *ex post facto* law. In that case Chief Justice Shaw said, at p. 81: "A new tribunal may be erected, or new jurisdiction given to an existing court, to try past offenses, and this is not *ex post facto*." In *State v. Jackson*, 105 Mo. 196, at the time of the killing, the court of appeal consisted of five judges a majority of whom made a quorum. By a subsequent constitutional amendment the number of judges of that court was raised to seven and it was divided into two divisions, one of which only had jurisdiction in criminal cases. That division consisted of three judges. It was held that "it was entirely competent for the people to adopt such a change in their organic law as to take away from this court as a whole all cognizance of criminal causes, and to confer such jurisdiction on a portion or division of this court, though less in numbers and different in personnel from this court as organized when the crime in question was committed." The case of *Commonwealth v. Phillips*, 11 Pick. 28, was relied upon by the Supreme Court of Missouri in coming to that conclusion. For a similar decision see *State v. Thompson*, 141 Mo. 408.

Finally it has been a common practice in this Commonwealth to do the very thing here complained of, namely, to enact statutes reducing the number of judges who are to preside at the trial of capital cases without excepting from their operation and making special provision for cases where the killing took place before the statute was enacted. This is not decisive of the constitutionality of such acts, but this practice, extending over a number of years, is an indication of what by common consent has long been regarded as within the limits of the Constitution.

By force of St. 1782, c. 9, and St. 1804, c. 105, capital cases were to be heard, tried and determined by this court sitting *in banc*. It was held in *Commonwealth v. Hardy*, 2 Mass. 303, that this provision covered the arraignment of the defendant in a capital case. St. 1832, c. 130, § 6, provided that a prisoner in such a case could be arraigned at a term of court holden by a single justice, leaving the trial to be conducted by the full court. This continued to be the law (see Rev. Sts. c. 81, §§ 15 and 18) until 1859, when from July 1 of that year until May 31, 1860, the Superior Court had jurisdiction of capital cases and trial was to be had before three justices of that court. St. 1859, c. 196, §§ 1, 21. We are not aware that any trial was held under these provisions. They were repealed and the former law re-established by Gen. Sts. c. 112, §§ 5 and 8; c. 181, § 2; c. 182, at p. 905; and it continued in force until the enactment of St. 1872, c. 282. That act provided that two or more justices of this court present at a jury term should have the powers of the full court in the trial of indictments for the crime of murder. This continued to be the law (see Pub. Sts. c. 150, §§ 18, 19) until the enactment of St. 1891, c. 379. By that act jurisdiction over capital cases was transferred to the Superior Court, and by § 2 it was provided that the trial should be before three justices. By St. 1894, c. 204, that was changed so that the trial could be before two or more justices. That continued to be the law (see R. L. c. 157, § 8) until the enactment of the statute here in question (St. 1910, c. 555, § 3) which repealed R. L. c. 157, § 8, and left trials in capital cases to be conducted by one or more justices under R. L. c. 157, § 2.

In the case at bar there was no change in the indictment that had to be found nor in the conduct of the trial by which the fact of the defendant's guilt had to be established, nor in his right to have any and all questions of law reviewed by the same appellate court that was in existence when the alleged crime was committed. The only change was in the fact that one in place of two or more judges was to and did preside at the trial. The learned counsel for the defendant has frankly admitted that the only connection in which this change operated to the injury or prejudice of the defendant was in matters lying in the discretion of the presiding judge. His contention is that the fact that

while before St. 1910, c. 555, § 3, matters lying in the discretion of the presiding judge were decided by two or more judges, at the trial they were decided by one judge only. But the reason why matters which are left to be finally decided in the discretion of the presiding judge are left to be so decided is because they are matters of such a character that whichever way they are decided it cannot be said that they are decided wrongly. We are of opinion that a change by which such matters are to be decided by one in place of by two or more judges is not a change which affects the substantial protection with which at the time the offense was committed the existing law surrounded the defendant as a person accused of crime. It follows that St. 1910, c. 555, § 3, repealing R. L. c. 157, § 8, is not void as an *ex post facto* law.

The entry must be that the order denying the motion in arrest of judgment should be affirmed.

So ordered.

ALEXINA HOULE vs. SUSY M. ABRAMSON.

Hampden. September 25, 1911. — October 17, 1911.

Present: RUGG, C. J., HAMMOND, BRALEY, & SHELDON, JJ.

214-561
215-'463
236-560
246-'403

Fixtures. Landlord and Tenant.

If the owner of land with a building thereon sells and conveys it to a purchaser and on the same day takes from the purchaser a lease for three years of a portion of the building, containing a china closet and a water heater, which before the sale were put in the building by the owner as removable furnishings and which at the time of the conveyance and of the making of the lease were personal property, and if the lease contains the ordinary covenant for redelivery of the premises at the end of the term, the tenant who was the former owner of the real estate is entitled to remove these articles of personal property at the termination of his lease, there having been no occasion for a severance until the tenancy was terminated, and the covenant for redelivery referring only to the reversion so that the tenant's title to the personal property on the premises at the beginning of the term remained unaffected by it.

BILL IN EQUITY, filed in the Superior Court on November 4, 1910, alleging that on December 2, 1907, the defendant conveyed by a warranty deed to the plaintiff a parcel of land with

buildings thereon situated on Bridge Street in Holyoke and numbered 524 and 526 on that street, that as a part of the purchase there passed to the plaintiff certain store fixtures and also one china closet and cabinet and a hot water heater used in the bath room on the second floor of the building, that the china closet and cabinet were built in and attached to the building and were a part thereof, as also was the heater, which was connected with the building by pipes, that on the same day of December 2, 1907, after the sale the plaintiff executed and delivered to the defendant a lease in writing for the term of three years of the first floor of the building, with an adjoining stock house and the barns and sheds on the premises and the tenement on the second floor of the building, that the lease had expired and that the defendant was about to quit and deliver up the premises and had advertised for sale the store fixtures, the china closet and cabinet; and praying that the defendant might be enjoined from removing or selling the fixtures and property belonging to the plaintiff.

The case was referred to William P. Hayes, Esquire, as master. The master filed a report, and at the request of the plaintiff reported certain evidence. Both the plaintiff and the defendant filed exceptions to the master's report. The case was heard on these exceptions by *Hitchcock, J.*, who made an interlocutory decree that the exceptions filed by the plaintiff and by the defendant be overruled and that the report of the master be confirmed. Later the case was heard further by *Pierce, J.*, who made a final decree that the plaintiff's bill be dismissed and that the defendant be awarded her costs of suit to the amount of \$89.54. From this decree the plaintiff appealed.

The case was submitted on briefs.

P. H. Sheehan, for the plaintiff.

A. L. Green & F. F. Bennett, for the defendant.

BRALEY, J. The plaintiff not having appealed from the interlocutory decree overruling the exceptions of both parties to the master's report, the questions raised by his exceptions are not open on his appeal from the final decree dismissing the bill, except so far as the final decree may have been erroneously affected by the interlocutory decree. R. L. c. 159, § 26. *Cawley v. Jean*, 189 Mass. 220. The master, however, not having been ordered to report the evidence, his findings of facts should not be set

aside unless from the report they appear to have been plainly wrong. The plaintiff, recognizing the rule, contends, that the master's conclusions, that the articles in question were personal property, not having been warranted by his general findings, should be set aside, and relief decreed.

It is unquestioned that, in pursuance of the written agreement of the parties, the deed of the defendant conveying the property to the plaintiff, the mortgage back to secure a part of the purchase price, and the lease by the plaintiff to the defendant of a portion of the premises, were executed and delivered simultaneously. The plaintiff derives ownership under the deed, and, as the articles claimed by the defendant to be her personal property are not specifically referred to in the deed, the plaintiff has no title unless they were fixtures and passed as part of the freehold. The principles of law applicable to the findings of the master have been so recently enunciated in *Hook v. Bolton*, 199 Mass. 244, and *Smith v. Bay State Savings Bank*, 202 Mass. 482, that any extended discussion is unnecessary. If as between grantor and grantee a question arises whether an article attached to, or put in place in a building on the granted premises, but which is not specifically described or referred to, and passes in title, if at all, under a general description of "a certain lot of land and buildings thereon" is personal property not conveyed by the grantor, or a fixture annexed to the realty, the character, purpose, mode of annexation, and the intention of the owner, are all to be considered. The defendant asserted no title to the curved counter, the shelving, wall fixtures, and the electric wiring in the store, which the master found were fixtures. The marble slab forming the finished top of the curved counter, although not separately claimed by her, but by her husband, who has not been joined as a party, is disposed of as to her by his finding that it was a constituent part of the fixture. *Leonard v. Stickney*, 181 Mass. 541. The gas fixtures, three counters, and the oil pump, while found to have been personal property, are also stated to be the property of the husband, over which the defendant has never assumed control or asserted against the plaintiff any adverse rights. But the cabinet, or china closet, and the hot water heater he decided, upon consideration of all the evidence and his general findings, were her personal prop-

erty. It is certain from the recital of the circumstances, that these articles were provided for the more convenient use and enjoyment of that part of the building occupied by the defendant as a dwelling for herself and family, and it was a question of fact, whether they were supplied as removable furnishings, or were intended as a substantial and permanent addition to the premises. The defendant after the deed was delivered having continued in occupation under the lease as the plaintiff's tenant, there was no occasion for a severance until the tenancy was terminated, and, as the covenant for redelivery of the premises referred only to the reversion, the tenant's title to the personal property thereon at the beginning of the term remained unaffected. *Holbrook v. Chamberlin*, 116 Mass. 155, 162.

We are, therefore, of opinion, that the decree should be affirmed with costs.

Ordered accordingly.

JULIAN PASZKOWSKI vs. STONY BROOK PAPER COMPANY.

Hampden. September 25, 1911. — October 17, 1911.

Present: RUGG, C. J., HAMMOND, BRALEY, & SHELDON, JJ.

Negligence, Employer's liability. Snow and Ice. Notice. Statute, Repeal.

St. 1908, c. 805, providing, that the provisions of the highway act, requiring ten days' notice of an injury from a defect consisting in part of snow or ice, shall apply to actions against persons or corporations founded upon the defective condition of the premises of such persons or corporations caused by or consisting in part of snow or ice, applied to and modified R. L. c. 108, § 75, requiring sixty days' notice of an action under the employers' liability act, which was in force when it was enacted, and likewise applies to St. 1909, c. 514, § 182, embodying in substance the provisions of that section, which is to be treated as a continuation of it with its modification, although St. 1908, c. 805, is not referred to in St. 1909, c. 514. Consequently no action can be maintained under St. 1909, c. 514, § 127, by an employee against his employer for personal injuries alleged to have been caused by the unsafe condition of the defendant's premises by reason of accumulations of snow or ice without proving that the required notice was given to the defendant within ten days after the injury.

TORT under St. 1909, c. 514, § 127, for personal injuries alleged to have been sustained while the plaintiff was at work in the employ of the defendant. Writ dated March 21, 1910.

The third count was as follows:

"Count 3. And the plaintiff says that on or about the seventeenth day of February, 1910, he was in the employ of the defendant; that while he was so employed, and in the exercise of due care, he was hurt and injured by reason of his falling from a platform, which platform the defendant was obliged to keep in safe and suitable repair and condition, but which was not in a safe and suitable condition but was defective and unsafe, it being covered with snow and ice, that said defective and unsafe condition arose from or had not been discovered or remedied, owing to the negligence of the defendant, or of some person or persons in its employ, entrusted with the duty of seeing that such platform was in proper condition; that by reason of said injury the plaintiff has suffered great pain of body and anguish of mind; and that due notice of the time, place and cause of the injury aforesaid was given by the plaintiff to the defendant."

In the Superior Court the case was tried before *Sanderson, J.* The plaintiff offered to prove that the accident occurred on February 17, 1910, from the plaintiff falling on a platform of the defendant outside the defendant's paper mill, that the cause of his falling was snow and ice, or ice partly covered with snow, which was on the platform and had been there four or five days before the day of the accident, and that a notice in writing of the accident was given by the plaintiff's attorney to the defendant on March 21, 1910.

The plaintiff elected to rely only on the third count of his declaration, quoted above, and the judge on the plaintiff's offer of proof ordered a verdict for the defendant. The plaintiff alleged exceptions.

St. 1908, c. 305, provides as follows: "The provisions of sections twenty, twenty-one and twenty-two of chapter fifty-one of the Revised Laws, in so far as they relate to notices of injuries resulting from snow or ice, shall apply to actions against persons or corporations founded upon the defective condition of the premises of such persons or corporations, or of an adjoining way, whenever such defective condition is caused by, or consists in part of, snow or ice."

The sections of the highway act above referred to provide

that in order to recover for bodily injury or damage to property sustained from a defect in a highway "the person so injured shall, within ten days thereafter, if such defect or want of repair is caused by or consists in part of snow or ice, or both, and in all other cases, within thirty days thereafter, give to the county, city, town or person by law obliged to keep said way, causeway or bridge in repair, notice of the time, place and cause of the said injury or damage."

R. L. c. 106, § 75, provided that "No action for the recovery of damages for injury or death under the provisions of sections seventy-one to seventy-four, inclusive, shall be maintained unless notice of the time, place and cause of the injury is given to the employer within sixty days." St. 1909, c. 514, § 132, contains in substance the same provision.

The case was submitted on briefs.

J. O'Shea, for the plaintiff.

W. H. Brooks & W. Hamilton, for the defendant.

BRALEY, J. The plaintiff concedes, that an action for personal injuries resulting from a defective condition of the premises which "is caused by or consists in part of snow or ice" cannot be maintained at common law since the St. of 1908, c. 305, unless within ten days after the injury, notice of the time, place and cause is given to the persons or corporations responsible therefor. *Baird v. Baptist Society*, 208 Mass. 29. *O'Donoghue v. Moors*, 208 Mass. 473. But having relied only on the third count of the declaration, which states a case under St. 1909, c. 514, § 127, governing under certain conditions the defendant's liability as an employer, he contends that the earlier statute is inapplicable. The St. of 1908, c. 305, while broad and comprehensive, does not in terms purport to be an amendment of existing statutes, yet, as was said in *Baird v. Baptist Society*, 208 Mass. 29, "it must be held that its scope is not limited to defects in ways, public or private, for which a person or corporation may be answerable at common law, but extends to any defect upon the premises whether or not it be in a way." It was enacted when R. L. c. 106, §§ 70-75 were in force, which subsequently were codified with other laws, "relating to labor" by the St. of 1909, c. 514, §§ 127-132. The Legislature when it passed the statute in question must be presumed to have

known of the provisions of the employers' liability act subjecting the employer, if notice was given within sixty days under § 75 of R. L. c. 106, to an action for damages for injuries caused to employees by defective ways, works and machinery, which of course would include the premises used in the business. It also had been decided, that, if the premises became unsafe from accumulated snow and ice, there was evidence for the jury under the statute of the defendant's negligence, and that, if the plaintiff's due care and the defendant's negligence were proved, he could have prevailed at common law, and resort to the statutory remedy did not enlarge the cause of action. *Ryalls v. Mechanics' Mills*, 150 Mass. 190. *Urquhart v. Smith & Anthony Stove Co.* 192 Mass. 257. It having been deemed expedient as the law stood to provide that the notice required by St. of 1908, c. 805, should be a condition precedent to recovery where the injury was caused in the manner described, no distinction was made as to the class of persons who might be affected, and § 75 having been modified accordingly, the defendant's liability to an action for damages depended upon compliance with the requirement, and not upon the form of procedure by which it could be enforced. By the St. of 1909, c. 514, § 145, § 75 is repealed, but as § 132 of the codifying statute embodies in substance the provisions of § 75 it should be construed as a continuation rather than as a repeal and re-enactment of the previous law. It is so declared by § 146, and this must have been the construction independently of the provision. *Wright v. Oakley*, 5 Met. 400, 406. *United Hebrew Benevolent Association v. Benshimol*, 130 Mass. 325, 327. *Bear Lake Irrigation Co. v. Garland*, 164 U. S. 1, 12.

The plaintiff presses the argument, that by the omission in the general act of all reference to the St. of 1908, c. 805, the legislative intention was to supersede it, where the person injured was an employee of the owner of the premises. But the statute not having been irreconcilable with existing laws before codification, it did not become repugnant when those laws were codified by the re-enactment of substantially similar provisions. *Bear Lake Irrigation Co. v. Garland*, 164 U. S. 1, 12. *Copeland v. Springfield*, 166 Mass. 498, 504, and cases cited.

The plaintiff having failed to bring himself within the condition, the action cannot be maintained, and the other questions raised are immaterial.

Exceptions overruled.

NALDA J. BEAULIEU vs. EMBURY P. CLARK.

Hampden. September 26, 1911. — October 17, 1911.

Present: RUGG, C. J., HAMMOND, BRALEY, & SHELDON, JJ.

Execution. Attachment. Officer.

When personal property is held by a deputy sheriff under attachment upon writs in different actions against the same defendant, such officer, not only must receive and execute all subsequent orders for the attachment of such property while it is in his custody, but also must receive and levy all executions which may issue in any of the actions, and it is right for such officer to refuse to surrender the property to another deputy sheriff to whom an execution upon a judgment in one of the actions has been delivered for service.

TORT against the sheriff of the county of Hampden for the alleged wrongful act of one Sullivan, a deputy of the defendant, in refusing to deliver to one Laduke, another deputy of the defendant, who held for service an execution in favor of the plaintiff, a horse which had been attached on the plaintiff's writ as belonging to one Reid against whose property the execution was issued, whereby the plaintiff lost his attachment on the horse and all benefit of his judgment and execution. Writ dated March 19, 1910.

In the Superior Court the case was tried before *Pierce, J.*, without a jury. The facts appeared in evidence which are stated in the opinion.

The defendant asked the judge to rule that upon all the evidence the plaintiff could not recover. The judge refused to make this ruling, and also refused to make certain other rulings requested by the defendant, which have become immaterial. He ruled that upon all the evidence the plaintiff was entitled to recover the value of the horse at the time that the demand for its delivery was made by Laduke upon Sullivan. The judge found for the plaintiff in the sum of \$170; and the defendant alleged exceptions.

The case was submitted on briefs.

R. J. Talbot, for the defendant.

J. O'Shea, for the plaintiff.

RUGG, C. J. This case presents a novel question respecting the rights of different deputy sheriffs touching personal property attached upon several writs. It is an action against the sheriff of Hampden county. The plaintiff was the plaintiff in a writ sued out of the Police Court of Chicopee, upon which personal property of one Reid therein named as defendant was attached by a constable. Later a deputy of the defendant named Sullivan demanded from the constable the property attached for purpose of attachment upon a writ in favor of another plaintiff against the same Reid, which the constable was not qualified to serve. The constable surrendered to Sullivan the property as required by law. R. L. c. 167, § 42. Thereafter, but before judgment upon the subsequent writ, the plaintiff recovered judgment in his action, and seasonably placed the execution in the hands of one Laduke, another deputy of the defendant, who demanded of deputy sheriff Sullivan the delivery to him of the property in order that he, Laduke, might sell it upon the execution in favor of the plaintiff. This demand was refused, and subsequently Sullivan sold the property on execution in the later action.

The question is whether when personal property is held under attachment in successive actions, the earliest of which goes to judgment, the attaching officer alone has the right to sell the property upon the execution or whether the execution may be given to another qualified officer who has thereupon the right to take possession of the property in order to make the sale. It is the law of this Commonwealth that where property has been attached by a deputy sheriff it cannot be attached afterwards by a different officer, but other writs should be placed in the hands of the first attaching officer. *Watson v. Todd*, 5 Mass. 271. *Vinton v. Bradford*, 13 Mass. 115. *Thompson v. Marsh*, 14 Mass. 269. *Wheeler v. Bacon*, 4 Gray, 550. *Robinson v. Ensign*, 6 Gray, 300.

It is plain also that if there is but one attachment, the attaching officer has no vested right to make levy upon the execution issuing in the action upon which the attachment was made. The execution may be given to another officer for service. *Sewall v.*

Mattoon, 9 Mass. 535. *Smith v. Bodfish*, 39 Maine, 136. *Lovell v. Sabin*, 15 N. H. 29, 37. Neither of these principles quite reaches to the facts in the present case.

It may be urged that an attachment is retention of the property in the hands of the law as security for the debt, and that an execution is a separate and distinct process, which can be levied upon the property by any competent officer, and that the rights of subsequent attaching creditors are preserved by the obligation resting upon the selling officer to hold the proceeds for their benefit (see *Drewe v. Lainson*, 11 Ad. & El. 529, 537); and that there may be the implication from R. L. c. 177, § 44 (which requires an officer who sells personal property on execution, in the event that it has been "attached by another creditor, or seized on another execution, either by the same or another officer" to apply the proceeds of the sale "to the discharge of the several judgments in the order in which the respective writs of attachment or execution were served"), that the first execution may be levied by an officer other than one holding the property under a subsequent attachment.

But the opposite view is supported by stronger reasons. It is fundamental that an attachment of ordinary chattels rests upon possession, and is immediately dissolved when the attaching officer parts with custody. *Sanderson v. Edwards*, 16 Pick. 144. *Field v. Fletcher*, 191 Mass. 494, and cases cited at 496. It would seem incongruous to hold that attachments made upon subsequent writs held by the first officer should be preserved, when the property itself is delivered out of his possession into that of another officer for levy of an execution. There is no provision of statute and no principle of practice which authorizes the first officer to hand over his subsequent writs to the second officer, or which otherwise preserves the attachments. Moreover, it would be a difficult question to determine how an attachment might be made upon a writ issuing after the property had been handed over to the second officer but before the sale. To which officer ought such a writ to be delivered for service? These and other troublesome questions will be avoided by establishing the plain and simple rule that when personal property is held under attachment upon two or more writs or precepts, the officer having custody of the property under such attachments shall receive

and execute not only all subsequent orders of attachment but also all executions which may issue in any of the actions. This is the more convenient procedure. It will be more easily understood by those whose duty calls them to know this branch of the law, and who are often men not trained in technical niceties. It is in harmony with the practice as to attachments upon successive risks, a practice which had its origin in convenience and orderliness.

Probably effect may be given to R. L. c. 177, § 44, by construing the words "another officer" quoted above as applying to those exceptional instances, where from the nature of things the personal property legally attached cannot be taken into the physical custody of the attaching officer, for example, to attachments of bulky personal property made under R. L. c. 167, § 45, where the attaching officer does not take the property into his actual possession (*Hubbell v. Root*, 2 Allen, 185, *Polley v. Lenox Iron Works*, 4 Allen, 329, *Scovill v. Root*, 10 Allen, 414, *Higgins v. Drennan*, 157 Mass. 384, and *Ayer v. Bartlett*, 170 Mass. 142) and to attachments of franchises of corporations authorized to receive tolls, R. L. c. 109, § 42 (see St. 1906, c. 463, Part III, § 158), and perhaps to certain aspects of equitable attachments under R. L. c. 159, § 3, cl. 7, as amended by St. 1910, c. 581, § 2. It would have applied also to sales of corporate shares held by attachment under R. L. c. 167, §§ 66 to 68, in force when said § 44 was enacted although since repealed. St. 1910, c. 581, § 1.

The defendant's request for a ruling that upon all the evidence the plaintiff could not recover should have been given. The case seems to have been fully tried, and it does not appear that any advantage would ensue from another trial.

In accordance with St. 1909, c. 286, let the entry be

Judgment for the defendant.

CARRIE W. HOAG vs. CHARLES E. HOAG.

Hampden. September 28, 1911. — October 17, 1911.

Present: RUGG, C. J., HAMMOND, BRALEY, & SHELDON, JJ.

Husband and Wife. Marriage and Divorce. Res Judicata. Fraud. Duress. Evidence, Presumptions and burden of proof. Equity Jurisdiction, To relieve from results of fraud or duress, Laches. Estoppel.

In a suit in equity by a wife against her husband to have declared void a deed which she alleged was procured from her in January of a certain year through fraud, cruelty and duress on his part, it appeared that over a year before she made the deed she had brought a petition against her husband in the Probate Court for separate maintenance, alleging cruelty, which was heard by that court after the April following the date of the deed, and that on appeal by the petitioner from the Probate Court to the Superior Court the petition was dismissed solely on the ground that in the April following the making of the deed the plaintiff and the defendant had become reconciled and had continued to cohabit together until April 15 and that the plaintiff had condoned the cruelty of which she complained in her petition for separate maintenance. *Held*, that, although the decree on the petition for separate maintenance establishing condonation was conclusive so far as the plaintiff's marital rights at that time were concerned, such condonation did not amount as a matter of law to conclusive proof of a ratification by the wife of the deed which she alleged was procured from her in the preceding January through cruelty and duress, but was to be considered with other evidence on that question.

Condonation in its proper legal sense has reference to marital rights and liabilities as such and to none other.

In a suit in equity by a wife against her husband to have declared void deeds from her to her daughter and from the daughter to the defendant conveying the plaintiff's interest in certain property, on the ground that the plaintiff was caused to execute and deliver the deed to the daughter through fraud and duress of the defendant, the mere fact, that the plaintiff stood by and saw the daughter convey the property to the defendant and made no objection, does not as matter of law estop her from maintaining the suit where it appears that the daughter had no interest in the matter but acted simply as a conduit.

Delay by a wife from January 5 to July 8 in bringing a suit against her husband to have set aside a conveyance of real estate which she alleged the defendant procured from her through fraud and duress, where it appears that the plaintiff lived with her husband until April and that while thus living with him she was under his influence and reasonably entertained fear as to his future conduct, does not as matter of law constitute such laches as to bar the suit.

Where through fraud and duress a husband procures from his wife a conveyance of her interest in certain property through a third person to himself, and he and she thereupon together occupy the property as a home for some months during which he makes certain expenditures "in the ordinary upkeep and care of the property" with no expectation that he would be repaid such expenditures and no request for such repayment, in a suit by the wife

against him to set aside the conveyance, he is not entitled to have any part of such expenditures awarded to him in a final decree which directs the conveyance to be set aside for fraud and duress.

BILL IN EQUITY, filed in the Superior Court on July 8, 1909, by a wife against her husband, seeking to have declared void because procured by fraud, cruelty and duress deeds conveying her interest in certain property, in which she was jointly interested with her husband, to her daughter and from her daughter to her husband.

The case was referred to James L. Doherty, Esquire, as master.

The master's findings with regard to the petitions of the plaintiff for separate maintenance, referred to in the opinion, were as follows:

"Beginning not later than 1907, the marital relations of the parties became more or less strained and on several occasions between October, 1907, and April, 1909, the plaintiff left the defendant, remaining away for short periods of time, and on December 7, 1907, she instituted proceedings against the defendant in the Probate Court for Hampden County for the purpose of securing separate support from him and alleging as a ground therefor: 'that her said husband has been guilty of cruel and abusive treatment of her and especially of threats of physical violence to her on two occasions during the year 1907, the dates of which petitioner cannot exactly specify, and of actual physical violence, in case at their residence in this city, on the following dates: August 30, October 19 and October 20, December 2, 3 and 7 of the year 1907.' A second petition for separate support was brought in the same court by the plaintiff against the defendant, dated May 4, 1909, and based upon substantially the same grounds as those set out in prior suit, the first petition pending at that date. These suits, or at least the prior suit, was tried first in the Probate Court and later, upon appeal, in the Superior Court, and the findings of" both of the courts are described in the opinion, where also are stated other material portions of the master's report.

The case was heard on exceptions to the master's report and on the question of final decree by *Pierce, J.* At the hearing the defendant asked for the following rulings:

1. That any acts of cruelty or coercion which the defendant

committed toward the plaintiff were by her condoned, and by reason of said condonation the plaintiff cannot recover in this action.

2. That the judgment in the former action dismissing the plaintiff's petition was an adjudication in favor of the defendant, and by reason of said judgment the plaintiff cannot recover in this action.

3. That the plaintiff in standing by and seeing her daughter convey the property in controversy to the defendant, and making no objection, ratified said act and said conveyance, and the plaintiff cannot recover in this action.

4. That the plaintiff in waiting from January 5 to July 8, and during said period making no demand for reconveyance of the property in controversy and no attempt to assert her alleged rights, was guilty of laches, and the plaintiff cannot recover in this action.

5. That the defendant is entitled to be repaid by the plaintiff one half of all moneys expended by the defendant for repairs, taxes and all other sums paid by him for protecting and preserving the property in controversy, and until the plaintiff has repaid to the defendant one half of all moneys so expended the plaintiff cannot recover.

6. That the defendant has an equitable lien on the premises in controversy for one half of all moneys expended by him in taxes, repairs and in preserving and protecting said premises, and until said lien is satisfied the plaintiff cannot recover.

7. That upon all the facts as found by the master, the plaintiff is not entitled to a reconveyance to her of her former interest in the property in controversy, nor to a decree in her favor.

8. And that the bill be dismissed.

A final decree was entered granting the prayers of the bill. The defendant appealed.

The case was submitted on briefs.

D. E. Webster & C. E. Hoag, for the defendant.

H. T. Richardson, for the plaintiff.

HAMMOND, J. The bill alleges in substance that the defendant and the plaintiff as husband and wife were joint tenants of certain real estate therein described, towards the purchase price of which the plaintiff contributed from her own money about

\$3,500, being more than one half of the whole price, that by reason of threats of bodily injury, and by fraud and duress practised upon her by the defendant, she was induced against her own will to convey all her interest in the property to him through a third person; and the prayer of the bill is that the deeds of conveyance be cancelled and the property be reconveyed to her.

The pleadings were completed and the case referred to a master, and, after an interlocutory decree overruling the defendant's exceptions to the master's report and confirming the report, there was a final decree for the plaintiff from which final decree the defendant appealed; and the case is before us upon this appeal.

It appears that at the hearing before the Superior Court upon the merits the defendant asked for certain rulings which evidently were not adopted by the court. Although the case is before us upon appeal from the final decree and not upon exceptions to the refusal to give these rulings, yet inasmuch as the propositions laid down in the rulings requested may be said fairly to be involved in the consideration of the appeal and furthermore to embody the only ground of the objections which the defendant in his brief makes to the decree, we shall follow the brief of the defendant and shall consider only the accuracy of the propositions upon which in his brief he relies.

It appears from the master's report that the plaintiff had brought in the Probate Court two petitions against the defendant for separate maintenance, each alleging as a ground therefor cruel and abusive treatment on his part; that "at least the prior suit" was heard and dismissed by the court solely upon the ground that inasmuch as on April 10, 1909, she and her husband became reconciled and continued to cohabit together as husband and wife from that time until the fifteenth day of the same month, she had thereby condoned the cruelty of which she complained. And on her appeal to the Superior Court the same result was reached for the same reason. It is urged by the defendant that the dismissal of the petition on the ground of condonation is as matter of law absolutely conclusive against the plaintiff in the present suit.

The deeds in question were executed in January, 1909. There can be no doubt that so far as respects the acts of cruelty before

April 10, 1909, whether or not they be all alleged in the petition, including those now relied upon to defeat these conveyances, the decree dismissing the plaintiff's petition for a separate maintenance is conclusive against her so far as her matrimonial rights are concerned. *Corbett v. Craven*, 193 Mass. 80, and cases cited. *Bassett v. Connecticut River Railroad*, 150 Mass. 178, and cases cited. But condonation in its proper legal sense has reference only to marital rights and liabilities as such and to none other. And while acts which amount to condonation of marital wrongs as such may be evidence of ratification of an act done under duress, or waiver of a fraud leading to the act, they are not necessarily conclusive in a case like the present. The question is not whether there has been condonation, but whether the act which the plaintiff seeks to have declared void has been in any way ratified by her. If it has been, then she must stand by it, and, if it has not been, then unless barred by estoppel or laches she may avoid it. And that is so whether or not she has condoned, so far as respects her marital rights, the violence by means of which she was led to the act. It is therefore manifest that the propositions contained in the first and second rulings requested by the defendant are not sound. Whether there had been ratification was a question, not of law but of fact; and in view of the disturbed condition of the mind of the plaintiff caused in part at least by the cruelty of the defendant, and of their past relations and the chances as to whether he would renew his acts of cruelty, the general uncertainty of his future conduct and the fact that she was living with him much of the time between the date of the conveyance and the filing of this bill, the court as the trier of fact may well have come to the conclusion that she neither in thought, word, or deed ever had ratified these conveyances. We see no error in such a finding.

There is nothing in the proposition contained in the third request that the plaintiff "in standing by and seeing her daughter convey the property in issue to the defendant and making no objections is estopped from ever afterwards complaining of the act." The daughter had no interest in the matter. She acted simply as the conduit through which the title passed from the plaintiff to the defendant. It is plain that as against the defendant there was no estoppel.

Nor has the plaintiff been guilty of laches. The deeds were executed on January 5, 1909. This bill was filed on July 8, 1909. During half of this time she was living with her husband and presumably to a greater or less extent under his influence. Her petition for separate maintenance was not dismissed by the Probate Court until after April 15, 1909. In view of these facts and of the nature of her life with her husband in the past together with the fear she reasonably may have entertained as to his future conduct, she may well have hesitated to act without proper deliberation as to the time. And the court considering all the circumstances may properly have concluded that she acted without undue delay, especially when the defendant does not seem to have been prejudiced thereby.

The defendant is not shown to be entitled to recover any sums expended by him. The master has found that these expenditures "were [made] in the ordinary upkeep and care of the property during a period of time when the same was occupied by the plaintiff and defendant as a home and with no expectation on the part of the defendant that he would be repaid such expenditure, and no request for such repayment in part was ever made upon the plaintiff by defendant prior to this suit."

Decree affirmed.

VINCENT BORUCINSKI *vs.* HAMPDEN REAL ESTATE TRUST & another.

Hampden. September 27, 1911. — October 17, 1911.

Present: RUGG, C. J., HAMMOND, BRALEY, & SHELDON, JJ.

Contract, Construction, Performance and breach. Surety. Bond.

The owner of certain land made a contract in writing with a contractor by which it was provided that the contractor should construct a building for the owner for the sum of \$6,500, \$1,000 of which the owner "will pay in cash, and \$5,500" the contractor "will loan to" the owner "on the lot and building at five per cent;" that the contractor would make a mortgage free of charge and allow the owner "\$100 off of this contract, which amount already has been paid for the plan. . . . The \$1,000 to be paid in cash satisfactory to both" the owner and the contractor. No interest was to be charged until the date when it

was provided that the contract should be performed by the contractor. The contractor and a surety executed to the owner a bond, which was conditioned on the performance of the contract and which contained a provision that the owner should retain not less than fifteen per cent of the value of all work performed and materials furnished in the performance of the contract until its complete performance by the contractor. The contractor abandoned the contract and the owner brought an action against him and the surety at the trial of which before a judge without a jury it appeared that the owner had paid the contractor \$100 when the plans were accepted and \$900 about twenty days later, at which time also he had given the contractor a note for \$5,500 secured by a mortgage on the land and building, and there was evidence that at that time the contractor had furnished labor and materials worth about \$1,459. The surety contended that the payments of \$1,000 and the giving of the note for \$5,500 secured by mortgage released him from liability on the bond. The judge found for the plaintiff. *Held*, that the phrase in the contract, that the \$1,000 was to be paid "in cash satisfactory to both" the owner and the contractor, meant that it should be paid to the contractor at any time satisfactory to the parties; that the purpose of the giving of the note and the mortgage was not for payment but for security for money lent and to be lent; and that, it appearing from the contract that the \$100 was paid for the plan, and there being evidence that the \$900 paid did not exceed eighty-five per cent of the value of the labor and materials then furnished by the contractor, the finding of the judge was warranted.

CONTRACT, against the Hampden Real Estate Trust, a voluntary association, and the American Surety Company, upon a bond by which the surety company guaranteed the performance by the real estate trust of a building agreement between it and the plaintiff. Writ dated November 27, 1909.

The case was heard by *Crosby, J.*, without a jury.

It appeared that the building agreement provided that the real estate trust would build for the plaintiff a certain building on a lot owned by him in Springfield "for the sum of \$6,500, \$1,000 of this amount the said Borucinski will pay in cash, and \$5,500 the said Hampden Real Estate Trust will loan to the said Borucinski on the lot and building at 5 per cent interest. . . . The said Hampden Real Estate Trust do hereby agree to commence work under this contract within two days from this date [April 5, 1909,] and to complete the work on or before October first, 1909. It is also agreed that the Hampden Real Estate Trust will make a mortgage herein named free of charge and also allow the said Borucinski \$100 off of this contract, which amount already has been paid for the plan herein referred to. The \$1,000 to be paid in cash satisfactory to both Borucinski and the Hampden Real Estate Trust. It is further agreed that

the Hampden Real Estate Trust is not to charge any interest on the mortgage until Oct. 1st, 1909."

The bond which was the subject of this action was in the penal sum of \$2,000, with the condition that, if the real estate trust "shall faithfully perform said contract on its part, according to the terms, covenants, and conditions thereof (except as hereinafter provided), then this obligation shall be void; otherwise to remain in full force and effect." The only provision which is material in this case was the following:

"Fourth: That the Obligee shall retain not less than fifteen per centum (15 p. ct.) of the value of all work performed and materials furnished in the performance of such contract until the complete performance by said Principal of all the terms, covenants and conditions thereof on said Principal's part to be performed; and that the Obligee shall faithfully perform all the terms, covenants and conditions of said contract on the part of said Obligee to be performed."

At the trial it appeared that the plaintiff paid the real estate trust \$100 when the plan was accepted and \$900 about April 20, 1909, at about which date he gave it a mortgage securing a note for \$5,500, and there was evidence that at that time the real estate trust had performed work under the contract worth about \$1,459. The real estate trust abandoned the work from four to six weeks after it was begun, and the plaintiff procured one Hogan to finish it for him.

At the close of the evidence the defendant surety company asked the judge to make the following rulings:

"1. If before the contractor abandoned the work the plaintiff made a payment on the contract before the entire work was complete, the surety was released from all obligations on its bond.

"2. If before the contractor abandoned the work and before the entire work was complete the plaintiff executed and delivered the mortgage provided for in the contract and especially if the contractor was thus enabled to avail himself of any funds raised by the mortgage, the surety was released from all obligation on its bond.

"3. If, either by payment of the \$1,000 or by the execution and delivery of the mortgage or any other way, the contractor

was prepaid for a value not as yet incorporated in the work, the surety was released from all obligation on the bond.

"4. If, either by payment of the \$1,000 or by the execution and delivery of the mortgage or any other way the contractor was prepaid for a value not as yet incorporated in the work and the surety suffered loss thereby, the surety was released from all obligation on its bond.

"5. If, either by payment of the \$1,000 or by the execution and delivery of the mortgage or any other way the contractor was prepaid for a value not as yet incorporated in the work, the surety was released from obligation on its bond to the extent of said prepayment and is entitled to a reduction on this account or any liability it may have incurred upon its bond.

"6. The provision and the bond for the withholding of fifteen per cent of all work performed and materials furnished was material for the protection for the surety, and any violation of this provision by the plaintiff released the surety from all obligation on its bond.

"7. The provision and the bond for the withholding of fifteen per cent of all work performed and materials furnished was material for the protection for the surety and any violation of this provision by the plaintiff involves a corresponding reduction in the amount for which the surety would be liable, if liable at all, that is to say, if the liability would be total than a reduction from the penal sum of the bond.

"8. By the act of the plaintiff in paying the one thousand dollars and also by his act in executing and delivering the mortgage and allowing the contractor to avail itself of certain proceeds thereof, the surety was released from all obligation on its bond.

"9. If the rental value of the building is an element of damage then from the rental value there should be deducted interest on the payments upon the Hogan contract from the time when the payments should have been made on the original contract up to the time when they were made under the Hogan contract."

The trial judge made the fourth, fifth, sixth, seventh and ninth rulings, and refused the first, second, third and eighth. He found for the plaintiff in the penal amount of the bond and ordered execution in the sum of \$1,756. The defendant surety company alleged exceptions.

The case was submitted on briefs.

C. H. Barrows, for the defendant surety company.

L. White, for the plaintiff.

HAMMOND, J. This is an action on a surety bond which guaranteed the performance by the defendant the Hampden Real Estate Trust, hereinafter called the real estate trust, of a building agreement between it and the plaintiff. The case is before us upon the exceptions of the defendant the American Surety Company, hereinafter called the defendant, which executed the bond only as a surety.

The defendant contends that by the fair construction of the building agreement no cash was to be paid nor was the mortgage to be delivered until the building was fully completed; and that by the delivery of cash and the mortgage before that time the contract was departed from and the fifteen per cent clause of the bond violated, and hence the defendant was thereby released from all obligation on the bond.

We do not adopt the defendant's construction of the contract. While it may be a general rule that the consideration for work to be done is not due until the work is done, still this rule is not applicable where there is anything in the agreement to the contrary. And this building agreement by fair implication does contain something to the contrary. The plaintiff was to pay \$6,500, of which \$1,000 was to be paid in cash and \$5,500 was to be lent by the real estate trust on a mortgage. The agreement was something more than a building contract. It contained a clause under which the real estate trust was to lend the plaintiff a portion of the cost of the building. The \$1,000 was to be paid in cash "satisfactory to both Borucinski and the" real estate trust. While it may be true, as contended by the defendant, that this clause refers to the kind of property which should be regarded as cash, still, considering that usually the term cash implies prompt payment, we think that the phrase as used here has reference also to the time of the payment and that a payment at any time satisfactory to the parties, even before the completion of the work, could not be regarded as a departure from the contract.

It is also fairly to be implied from the contract that the mortgage when considered in connection with the circumstances was

to be given before the completion of the building. The \$5,500 is described in the agreement as the sum to be lent to the plaintiff. It evidently was regarded by the parties as security for the money to be lent. Before the close of the work the property might be attached or other incumbrances might be placed upon it so that the mortgage would fail to secure the lender as such. Moreover the work was to be completed on or before October 1, 1909, and the agreement provided that no interest was to be charged on the mortgage until October 1, 1909. Under all the circumstances we think it fairly appears from the building agreement that it was within the contemplation of the parties that not as payment but for the sake of security for the money to be lent the mortgage should be given at any reasonable time, even before the work was done. The judge ruled as requested by the defendant that the fifteen per cent clause in the bond "was material for the protection for the surety, and any violation of this provision by the plaintiff released the surety." Under this ruling the judge must have found that the mortgage was not then given as payment for work done but as security for the money lent or to be lent. In giving it for this purpose the plaintiff is not shown to have departed from the contract. The fact that the real estate trust assigned the mortgage is not material in this case.

The \$100 appears by the written agreement to have been paid for the plan, and the judge under the ruling above named must have found that the cash subsequently paid to the amount of \$900 was not in excess of eighty-five per cent of the amount due, and hence was not paid in violation of the fifteen per cent clause of the bond. This finding is supported by the evidence. There appears no error in the manner in which the court dealt with the defendant's requests.

Exceptions overruled.

JOSEPH A. LOVERING, administrator, vs. FRANCIS A.
BALCH & others.

d 51-538

Worcester. October 2, 1911. — October 17, 1911.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DECOURCY, JJ.

Devise and Legacy, What estate. Will, Construction.

A plain gift in a will will not be modified by uncertain language of a codicil to any greater extent than such language expressly requires.

A father of three children, who was not trained in the refinements of language, in 1869 executed a will in which by apt language he created a life estate of substantially all of his estate consisting of both real and personal property for the benefit of his wife with a remainder to his three children. One of his daughters, who then was unmarried, subsequently married and in 1875 became grievously sick and had not recovered in 1876, when the testator made a codicil providing as follows: "Whereas In making a division of my property among my children I wish if my daughter shall die leaving no child or children, that there be a trustee appointed by the Judge of Probate to take charge of the share that falls to her by the provisions of my will and that her husband, my draw the income, and use said income as his own, but the Principal shall be kept in trust till his death, when the money kept in trust shall be divided between my other children and their heirs in equal division according to legal Decent." The testator died in 1876, leaving the daughter surviving him, and, the testator's widow having died, a complete division of his estate was made and the daughter received one third of it. In 1910 the daughter died childless, leaving her husband surviving. *Held*, that, taking into consideration all the circumstances, including the condition of the statutes as to rights of a husband in the estate of his wife when the codicil was made and when it took effect, it was apparent that the codicil was intended to be operative only in the event that the daughter died childless before the testator, and therefore that it did not operate to make the title to the property which she had received in the distribution of her father's estate less than absolute.

BILL IN EQUITY, filed in the Probate Court for Worcester County on October 16, 1910, by the administrator of the estate of Ellen M. Pierce, late of Leominster, for instructions as to what disposition should be made by him of property which his intestate had received under the will and codicil of her father, Francis Balch, late of Leominster. The defendants, besides the Attorney General of the Commonwealth, were the husband and the heirs at law and next of kin of Ellen M. Pierce.

The contention of the heirs at law and next of kin, as stated in their answers, was that under the will and codicil of Francis Balch, quoted in the opinion, in the event that Ellen M. Pierce

should die leaving no child or children, the share given to her under the will should be subject to a life interest in her husband, George A. Pierce, with vested remainder in the other children of the testator and their heirs share and share alike.

The contention of the husband of the intestate, George M. Pierce, was that under the circumstances Ellen M. Pierce acquired an absolute title to the property which she received under her father's will, that it was not subject to a mere life estate in his favor, and that on her death he was entitled to his statutory share therein.

The case was reserved by *Loring, J.*, upon the bill and answers for determination by the full court. The facts are stated in the opinion.

J. A. Lovering, administrator, *pro se*.

R. W. Nason, (*C. F. Worcester* with him,) for Francis A. Balch and others.

J. W. Healey, for the defendant Pierce.

RUGG, C. J. Francis Balch executed a will in 1869, by which he created a life interest of substantially all his property, consisting of both real and personal estate, for the benefit of his wife, and gave the remainder to be equally divided between his three children, Ellen, Ravella and Oscar. Ellen, then unmarried, subsequently married, and in the autumn of 1875 was grievously sick, and had not recovered in January, 1876, when the testator executed a codicil as follows: "Know all men by these presents, that I, Francis Balch, of Leominster, in the County of Worcester and Commonwealth of Massachusetts having made my will, do hereby make a codicil to this my last will and testament; Viz: Whereas In making a division of my property among my children I wish if my daughter Ellen Maria Pierce shall die leaving no child or children, that there be a trustee appointed by the Judge of Probate to take charge of the share that falls to her by the provisions of my will and that the said George S. Pierce, her husband, my draw the income, and use said income as his own, but the Principal shall be kept in trust till his the said George's death, when the money kept in trust shall be divided between my other children and their heirs in equal division according to legal Decent. I authorize

the Executors named in my will to act as in case of this my Codicil."

The testator died in 1876, and in that year his will and codicil were duly allowed. A complete division of his estate was made, and the daughter Ellen took possession of one third of his estate after the death of her mother and has changed its investment, and died in 1910 childless, survived by her husband, George S. Pierce, mentioned in the codicil. The question to be decided is the nature of the estate given the daughter Ellen.

The familiar rule in the interpretation of wills is to ascertain the intent of the testator from the words used, reading them in the light of the circumstances under which he employed them, and then give effect to that intent, unless prevented by some rule of construction which has become fixed and unyielding. A will and codicil are to be read together as one instrument, speaking as of the date of the testator's death. It is plain that by the will an unqualified estate was given to the daughter, Ellen. The controversy centres about the effect of the codicil. It is urged that its fair intendment is to cut down this absolute estate to a life estate in case the daughter survived her mother, the share to be divided after the death of her husband among the testator's kindred. This construction involves too violent a modification of the language used to be fairly warranted. In order to adopt it, one must say that the codicil gave the daughter only a life estate with remainder to surviving children, and this wholly by implication. The plain gift of the will is not to be modified by the uncertain language of the codicil to any greater extent than is expressly required. *Bassett v. Nickerson*, 184 Mass. 169. *Pitts v. Milton*, 192 Mass. 88. The testator shows by the provision in the will for the benefit of his wife that he knew how to create a life estate when that was his design. These considerations render impossible the construction that a life estate was created. It is argued next that the language gives to Ellen a fee determinable upon her death, leaving no children then alive, with an executory devise over to the husband for life with remainder to testator's other children. *Hooper v. Bradbury*, 183 Mass. 303, is relied upon as an authority. The language of the will there under consideration

was different in the decisive respect of a plain indication of intent by the testator that the first donee should take in no event an absolute estate, and that a trustee should be provided to hold during her life. It does not govern this case. Nor do any other of the many cases where such a construction has been adopted appear to be controlling.*

The difficult point in the present case is whether the language of the codicil cuts down the absolute gift of the will, or whether it was intended to be effective only in the event that the daughter Ellen without leaving issue should predecease the testator. The situation of the testator and the state of the law of descent and distribution at the time are important factors bearing upon the ascertainment of his intent. His daughter had been very sick, and had suffered a relapse, and had not recovered at the time the codicil was executed. If she should die before him, her husband would receive nothing from the testator's estate. The language of the codicil makes plain the testator's desire that the son in law should share to some extent in his bounty. Indeed, this appears to be the dominant purpose of the codicil. It is the thought which strikes one first in reading its terms. It is only when one indulges in the subtleties of speculation as to the possible meanings of language that other interpretations come to mind. As the law stood, both when the codicil was executed and when it was allowed, the daughter, if she survived the testator and died testate, never having had children, could have deprived her husband against his protest of all her real estate and all but one half her personal property. Gen. Sts. c. 108, §§ 9, 10; c. 94, § 16; c. 91, § 1. *Burke v. Colbert*, 144 Mass. 160. *Silsby v. Bullock*, 10 Allen, 94. Apparently, under these statutes the husband's right under similar circumstances, in case of her intestacy, would have been confined to her personal property. See St. 1877, c. 83. The rights of a

* *Brightman v. Brightman*, 100 Mass. 288. *Whitcomb v. Taylor*, 122 Mass. 248, 250. *Schmaunz v. Goss*, 182 Mass. 141, 145. *Hooper v. Bradbury*, 183 Mass. 303, 306. *Welch v. Brimmer*, 169 Mass. 204, 211. *Dorr v. Johnson*, 170 Mass. 540. *Gilkie v. Marsh*, 186 Mass. 836, 840. *Blanchard v. Blanchard*, 1 Allen, 228, 230. *Richardson v. Noyes*, 2 Mass. 56. *Hubbard v. Rawson*, 4 Gray, 242. *Homer v. Shelton*, 2 Met. 194, 199. *Ide v. Ide*, 5 Mass. 500, 508. *Burbank v. Whitney*, 24 Pick. 148, 155. *Nightingale v. Burrell*, 15 Pick. 104, 118.

husband in the estate of his deceased wife were then appreciably less than under the present statutes. See R. L. c. 132, § 1; c. 135, § 16, as amended by St. 1906, c. 129, § 1; c. 140, § 8, cl. 8, as amended by St. 1905, c. 256.

It being plain that the testator was kindly disposed toward his daughter's husband, and desired to make some beneficial provision for him in case he should be a widower at the testator's decease, it is not likely that he had also an intent to restrict beyond the somewhat narrow limits then established by law his rights in the estate of his wife in the event that she survived the testator. The testator's dubious phraseology does not readily lend itself to the expression of such a purpose. From the spelling and construction of the other parts of the will, it is apparent that the testator was not trained in the refinements of language. He was more likely to have gone straight to the expression of a single determination than to have phrased a sentence with careful consideration of its bearings in the light of several different contingencies. For these reasons it seems that the codicil was intended to be operative only in the event that the daughter Ellen died before the testator, and that the words employed will more readily effectuate this intent than any other. *Donnell v. Newburyport Homœopathic Hospital*, 179 Mass. 187. *Briggs v. Shaw*, 9 Allen, 516. *In re Hayward*, 19 Ch. D. 470. The rule laid down in *Britton v. Thornton*, 112 U. S. 526, 538, is not applicable to the facts here disclosed.

Decree of Probate Court affirmed.

COMMONWEALTH vs. FOSTER B. PHELPS.

SAME vs. SAME.

Worcester. October 2, 1911. — October 17, 1911.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DECOURCY, JJ.

Milk. Evidence, Relevancy and materiality, Competency, Opinion: experts. *Practice, Criminal*, Conduct of trial. *Witness.*

In a prosecution under R. L. c. 56, §§ 57, 58, charging the defendant with having in his possession with intent to sell and in receptacles not properly marked milk which was not of good standard quality or from which the cream or a part

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232-479
252-446
252-446
254-472

thereof had been removed, where it has been proved that the defendant had had in his possession with intent to sell milk of the description set out in the complaint, evidence, that he had not intended to have in his possession with intent to sell milk which the statute prohibited or that the milk which he had in his possession and had intended to sell was not of a character injurious to the public, is immaterial on the question of the defendant's guilt.

At the trial together of two complaints, the first charging the defendant with having in his possession with intent to sell milk which was not of good standard quality, contrary to the provisions of R. L. c. 56, § 57, and the second charging him with having in his possession with intent to sell and in receptacles not properly marked milk from which the cream or a part thereof had been removed, contrary to the provisions of § 58 of the same chapter, a witness for the Commonwealth was asked in cross-examination if he had read certain bulletins issued by chemists of the United States Agricultural Department and if certain statements therein were not contrary to statements by him in his direct testimony. He answered that he had read some of the bulletins but that he had not found therein any such statement as the defendant referred to. The defendant then offered a bulletin, corresponding to the description contained in his question of the witness, without further proof of its authentication and offered to show by statements therein facts contrary to some testified to by the witness in his direct examination. *Held*, that the document did not tend to contradict the testimony of the witness, and therefore was not admissible even in cross-examination.

At the trial together of two complaints, the first charging the defendant with having in his possession with intent to sell milk which was not of good standard quality, contrary to the provisions of R. L. c. 56, § 57, and the second charging him with having in his possession with intent to sell and in receptacles not properly marked milk from which the cream or a part thereof had been removed, contrary to the provisions of § 58 of the same chapter, neither the whole nor any part of a document bearing the title "Milk and Its Relation to the Public Health, House of Representatives, Document No. 702 under the supervision of the Hygienic Laboratory, Bulletin No. 41, W. J. Rosenan, Director, printed in the government printing office, Washington, D. C.," or of a book entitled "The Science and Practice of Cheese-making" asserted by the defendant to have been published by a person whom one of the witnesses had quoted in his direct examination, or of a document called "Bulletin No. 110," asserted by the defendant to have been written by chemists of the Hatch Experiment Station of the Massachusetts Agricultural College, is admissible to disprove assertions of witnesses for the Commonwealth.

It is within the discretionary powers of the judge presiding at the trial of a criminal complaint to determine how far the defendant shall be permitted in cross-examination of witnesses for the Commonwealth to inquire into collateral matters for the purpose of showing that the witnesses are hostile or biased in their opinions, as also to determine whether a witness offered by the defendant as an expert is qualified to give such testimony, and, unless it clearly appears that the judge acts arbitrarily or that the defendant is prejudiced unjustly, the judge's decision in such matters will not be reversed by this court.

TWO COMPLAINTS, received and sworn to in the Police Court of Fitchburg on April 26, 1910, the first charging the defendant with a violation of R. L. c. 56, § 57, in having in his posses-

sion with intent to sell milk which was not of good standard quality; and the second charging him with a violation of § 58 of the same chapter in having in his possession with intent to sell milk from which the cream or a part thereof had been removed without the receptacle being marked "skimmed milk."

On appeal to the Superior Court, the cases were tried together before *Fox, J.*

One Charles E. Hickey, called by the Commonwealth, testified that he had analyzed milk taken on the defendant's premises and that he had found all of the samples below the statutory standard in fat and solids, and that in two of the samples the percentage of the protein was greater than the percentage of fat, which showed unmistakably that cream had been removed from the milk, "for in unskimmed normal milk the percentage of fat always exceeds the percentage of protein"; that a percentage of two and five-tenths in fat "is the lowest he ever found ever attained in unskimmed normal milk, while in this case the percentage of fat in one sample was as low as two per cent." On cross-examination he was asked if he had not heard of cases where the protein exceeded the fat, and where the percentage of fat was less than two and five-tenths in normal milk. He replied that he had never heard of such cases. He then was asked if he had read the bulletins on milk and its composition issued by the chemists in the United States Agricultural Department, and if it was not stated therein that a percentage of fat below two per cent had been found in normal milk. He said he had read some of the bulletins but he had not found any such statement there or elsewhere. The defendant then produced a bulletin entitled "Milk and Its Relation to the Public Health" issued in 1908 as "House of Representatives, Document No. 702 under the supervision of Hygienic Laboratory, Bulletin No. 41, M. J. Rosenan, Director, printed in the government printing office, Washington, D. C.," and offered to show by statements and tables therein that the protein in normal milk sometimes exceeds the fat and that the percentage of fat is sometimes below two per cent in such milk. The presiding judge excluded the evidence thus offered.

One Herman C. Lythgoe, called by the Commonwealth, corroborated the testimony of Hickey in the main and especially the statement that the lowest percentage of fat in pure milk he

had ever found was two and five-tenths per cent and that in such milk the percentage of protein was always less than the fat. In the course of his cross-examination he stated that certain statements and figures he had given in his direct examination on the percentage of fat in milk were the figures of one Van Slyke in an article published by him in the American Journal of Science. On cross-examination he was asked if the Van Slyke he referred to was Lucius L. Van Slyke, Ph.D., the chemist of the New York Agricultural Experiment Station, and he said "He is the man." The defendant then produced a book entitled "The Science and Practice of Cheese-making," purporting to be published by Van Slyke and another, and offered to exhibit it or to read therefrom statements and figures tending to contradict the testimony of the witness. The presiding judge excluded the evidence.

The defendant then asked the witness if he knew "Joseph B. Lindsey, Ph.D., the head chemist of the Hatch Experiment Station of the Massachusetts Agricultural College at Amherst," and he replied that he did not know him personally, but he had heard of him and presumed he was a good chemist. The defendant thereupon produced "a bulletin, No. 110, on market milk, written by said Lindsey and Prof. P. H. Smith, assistant chemist at said Hatch Experiment Station," and offered to exhibit or to read therefrom for the purpose of showing that the percentage of fat in pure milk is sometimes lower than two and five-tenths per cent. The presiding judge excluded the evidence.

The defendant called Charles W. Wood, Esquire, an attorney at law, who testified that he had been familiar with milk and cream both as a handler and producer for forty years; that he had had for a long time a large herd of cows and had made a study of milk and its constituent parts for many years and had written extensively on the subject; that he owned and used a Babcock tester for the purpose of ascertaining the percentage of fat and solids in the milk from his cows; that he never turned the handle nor filled the testing bottles with the milk and acids when a test has been made, but that the tests had been made hundreds of times under his observation and supervision; that it had been his custom for years to have many of his cows tested for the advanced registry of the Holstein-Friesian Association of America, which testing had been done under his direction and

supervision by a supervisor furnished by the Hatch Experiment Station at the Massachusetts Agricultural College in Amherst. The defendant then asked him to examine the cards which the State chemist had sent to the defendant, on which appeared the analysis of the samples of milk taken on the defendant's premises, and to state whether in his opinion such analysis showed conclusively that the milk or any part of it had been skimmed. The Commonwealth objected to the question on the ground that Mr. Wood had not qualified himself to testify as an expert on the matter. The presiding judge sustained the objection and excluded the testimony on the ground that it did not appear that he was a chemist or that he could make an analysis of milk himself.

The defendant then asked Mr. Wood the following question: "What is the lowest percentage of fat you have found in normal milk from your cows as disclosed by the Babcock test when made under your observation and supervision?" The presiding judge excluded the question.

The defendant also asked Mr. Wood whether he had with him books or bulletins relating to milk and its composition of recognized authority, and he said that he had, and thereupon produced the first bulletin above described. The defendant stated that he offered the book to show that it was therein stated that the percentage of fat in normal milk is sometimes as low as one and sixty-seven one-hundredths per cent, and that sometimes the protein in normal milk exceeds the fat therein. The presiding judge excluded the bulletin.

The jury returned a verdict of guilty in both cases; and the defendant alleged exceptions.

B. W. Potter, for the defendant.

J. A. Stiles, District Attorney, (*E. T. Esty*, Assistant District Attorney, with him,) for the Commonwealth.

BRALEY, J. The complaints respectively charged the defendant under R. L. c. 56, §§ 57, 58, with having in his possession milk below the standard prescribed by § 56 of that chapter, and milk from which the cream or a part thereof had been removed, which he intended to sell in violation of the statute, and, having been convicted, he urges that the published official documents, articles or bulletins treating of the subject and containing certain statements that milk might be pure even if found to be below the

percentage of fat required by our statute, or that protein in normal milk sometimes exceeds the fat, which were offered by him in evidence, were relevant and should have been admitted. But proof of the defendant's intention not to sell milk below the standard, or that milk might be considered as commercially pure or even normal although sometimes lacking the full statutory requirement, was inadmissible. In prosecutions for statutory misdemeanors of the class defined by the statute, the intention or design of the defendant not to violate the law, or proof that the product which he sells is not injurious to the community, may absolve him from moral turpitude but cannot relieve him from the penal consequences of the prohibited act. *Commonwealth v. Wheeler*, 205 Mass. 384. *Commonwealth v. New York Central & Hudson River Railroad*, 202 Mass. 394, 396, 397, and cases cited.

There is no rule of evidence applicable to either complaint which makes documents of the character here offered competent evidence of the truth of the alleged facts found in the publication.

Nor did the questions asked and excluded in cross-examination of the witnesses for the prosecution have any tendency to contradict their testimony. The various publications therein referred to contained no statement made by either of the witnesses, and they were not responsible for the views of publicists or government officials in which they did not participate.

It also was for the judge to determine how far the defendant should be permitted to inquire into collateral matters for the purpose of showing that they were hostile or biased in their opinions, or whether the witness offered by the defendant as an expert was sufficiently qualified to give evidence. *Jennings v. Rooney*, 188 Mass. 577, 579. *Muskeget Island Club v. Nantucket*, 185 Mass. 303. We find nothing in the exceptions indicating that he acted arbitrarily, or that the defendant was unjustly prejudiced. It has long been settled that unless this clearly appears, the decision of the trial judge on questions calling for the exercise of his discretion will not be reversed by this court. *Jennings v. Rooney*, 188 Mass. 577, 579, and cases cited. *Carroll v. Boston Elevated Railway*, 200 Mass. 527, 533, and cases cited.

Exceptions overruled.

WORCESTER TRUST COMPANY, executor & trustee, vs. M.
LOUISE TURNER & others.

Worcester. October 2, 1911. — October 17, 1911.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DeCOURCY, JJ.

Devise and Legacy. Words, "Relation."

A sister-in-law of a testator, named as a legatee, who died before the testator leaving issue surviving the testator, is not a "relation of the testator" within the meaning of R. L. c. 185, § 21.

A will, which contained a large number of legacies, concluded with the following provision: "If after all these legacies have been paid in full there shall still be a residue left, I bequeath that to be divided among the first sixteen legatees named in this will, in proportion to the several amounts given to each." There was such a residue to be distributed. The first sixteen legatees named were relations and friends of the testator and their legacies were given successively in sixteen separate articles of the will. Three of these legatees died before the testator. One was not a relation of the testator and the other two left no issue, so that their legacies lapsed and the amounts named in these legacies fell into the residue of the estate to be distributed under the clause above quoted. *Held*, that the residuary legatees were the first sixteen legatees named in the will, whether they actually took under it or not, and that the residue, increased by the amounts of the three lapsed legacies, was to be distributed among the sixteen legatees named in the will as it was written, except that the shares of the residue which thus would go to the three deceased legatees were to be distributed as intestate property to the next of kin of the testator.

A share of a residuary bequest which has lapsed by reason of the death of the legatee, being itself a part of the residue, cannot be distributed under the residuary clause and goes to the testator's next of kin as intestate property, unless the will shows a manifest intention of the testator that such a lapsed residuary legacy shall go to increase the shares of the other residuary legatees. In the present case no such intention was shown.

One of the bequests in a will was the gift of a fund of money to a trustee, "but in trust" to pay the income to the testator's sister during her life, with a discretionary power in the trustee, if the income should "be insufficient at any time to provide for all her necessities and reasonable comforts," to pay to her so much of the principal as might be needed therefor. The trustee was directed to exercise discretion in favor of the beneficiary. She was authorized to dispose of the principal of the fund by will, and, in case she did not do so, the fund at her decease was to go to the testator's heirs. A later provision in the will was as follows: "In the event my estate should not be sufficient to pay the legacies in full bequeathed in this will, I direct that the legacy to my sister, [naming her,] shall first be paid her in full." After providing for the order of payment of the other legacies, came the following clause: "If after all these legacies have been paid in full there shall still be a residue left, I bequeath that to be divided among the first sixteen legatees named in this will, in proportion to the several amounts given to each." The legacy for the benefit of the tes-

tator's sister was one of the sixteen thus designated. There was a residue to be distributed under the clause last quoted, and the testator's sister contended that she and not the trustee was the legatee referred to and that she was entitled to receive personally the share of the residue corresponding to the legacy for her benefit. *Held*, that the trustee and not the beneficiary for life was the legatee designated to receive the share of the residue, and that such share was to be added to the fund held in trust.

BILL IN EQUITY, filed in the Probate Court for the county of Worcester on March 11, 1911, by the Worcester Trust Company, a corporation, as executor and trustee under the will of Horace A. Young, late of Worcester, for instructions.

The bill alleged that, so far as known to the plaintiff, the defendants were the only persons interested in the subject matter of the bill, that *Jemima Aldrich*, the legatee named in the fourteenth article of the will, died after the death of the testator, and that the defendant *William DeF. Aldrich* had been appointed administrator of her estate in the State of Rhode Island; that the ninth article of the will contained the following bequest, "To my sister-in-law, *Lydia Young* of Woonsocket, Rhode Island, I bequeath the sum of two thousand dollars"; that *Lydia Young* was not otherwise than as designated in this bequest a relation of the testator, and that she died before the testator, leaving as her only issue one son, the defendant *Alfred Young*; that clause fifth of article thirtieth of the will provided as follows, "Fifth: If after all these legacies have been paid in full, there shall be a residue left, I bequeath that to be divided among the first sixteen legatees named in this will, in proportion to the several amounts given to each"; that *Warren E. Sibley*, named as legatee in the eighth article of the will, died before the testator leaving no issue him surviving; that *Victoria M. Worcester*, named as legatee in the seventeenth article of the will, died before the testator leaving no issue her surviving; that all the legacies and gifts in the will, other than that in clause fifth of article thirtieth, had been paid in full; that there was a substantial residue to be disposed of by clause fifth of article thirtieth of the will; and that certain of the defendants were the heirs at law and next of kin of the testator.

The bill prayed for instructions as to the following matters:

"1. Who are the first sixteen legatees named in this will, to whom under clause fifth of item thirtieth the residue of the

estate is given in proportion to the several amounts given to each? Are the said first sixteen legatees the first sixteen who under the circumstances existing at the death of the testator received an actual legacy under his will, or are they those of the first sixteen legatees actually named in his will who survived the testator and received the legacies provided for them, or is there an intestacy as to any part of said residue?

"2. In what proportion or proportions is said residue to be divided, and to whom is it to be paid?

"3. Is the share of the residue to which the defendant, M. Louise Turner, is entitled to be paid to her or to the Worcester Trust Company on the trusts set forth and contained in item second of said will?

"4. Does the legacy to Lydia Young contained in the ninth item of said will lapse and fall into the residue, or is her surviving issue, the defendant Alfred Young, entitled thereto?"

The will was dated October 19, 1904, and was proved on April 6, 1909.

The second article of the will was as follows:

"To the Worcester Trust Company, a corporation duly established by law and located in said Worcester, I bequeath the sum of fifteen thousand dollars, but in trust nevertheless to be held prudently invested and to pay the income thereof semi-annually to my sister, M. Louise Turner, of Oakland, Rhode Island, during her life, and in case the income shall be insufficient at any time to provide for all her necessities and reasonable comforts, said Trustee is authorized in its discretion to pay to her so much of the principal thereof as may be needed therefor, and I wish my said Trustee to exercise discretion in her favor. It is my wish that said Trustee will invest said sum or continue the investment thereof in Savings Banks or any good securities which shall not be directly taxable, in order that the income of said fund may be as large as may be for the benefit of my sister.

"I hereby authorize and empower my sister to dispose by will of the principal of said fund or whatever residue thereof may be left in the hands of the Trustee at her decease, and in case she does not dispose of the same by will, then at her decease said fund or whatever may remain thereof, shall be distributed among

those persons living at her decease who would constitute my legal heirs."

The third to the eighteenth articles, inclusive, gave pecuniary legacies to individuals. Of these the eighth gave \$5,000 to the testator's nephew Warren E. Sibley, the ninth gave \$2,000 to the testator's sister-in-law Lydia Young and the seventeenth gave \$8,000 to his niece Victoria M. Worcester.

The nineteenth to the twenty-fifth articles, inclusive, gave pecuniary legacies to charitable corporations and a religious society.

The twenty-sixth to the twenty-ninth articles, inclusive, made specific gifts to individuals of personal chattels such as books, pictures and a piano.

The thirtieth article was as follows:

"In the event my estate should not be sufficient to pay the legacies in full bequeathed in this will, I direct that the legacy to my sister, M. Louise Turner, shall first be paid her in full.

"Second: That the legacy to my niece, Victoria M. Worcester be paid in full.

"Third: That the legacies numbered three to sixteen inclusive bequeathed in my will be paid in proportion to the amounts severally bequeathed to each.

"Fourth: If my property left at my decease is sufficient to pay the first seventeen legacies given in my will in full, I then direct if there is sufficient residue to pay the nine remaining beneficiaries the full amount of each legacy, and if said residue is not sufficient, I direct that said remaining nine beneficiaries be paid in proportion to the several amounts bequeathed to them.

"Fifth: If after all these legacies have been paid in full there shall still be a residue left, I bequeath that to be divided among the first sixteen legatees named in this will, in proportion to the several amounts given to each."

The thirty-first article, which was followed by the attesting clause, nominated the plaintiff as the executor of the will.

In the Probate Court *Chamberlain, J.*, after ordering that the bill be taken as *pro confesso* against those of the defendants who had not filed answers, made a decree as follows:

"And it further appearing that Warren E. Sibley, named in the

eighth item of said will, and Victoria M. Worcester named in the seventeenth item, deceased prior to the death of the testator leaving no issue surviving him; and that Lydia Young named in the ninth item was not a relation of said testator, after hearing and consideration, the court doth order and decree that in disposing of the residue of his estate in these words:

“If after all these legacies have been paid in full there shall still be a residue left, I bequeath that to be divided among the first sixteen legatees named in this will, in proportion to the several amounts given to each.”

“The testator meant the first sixteen legatees named in the will as written, to wit: Worcester Trust Company, Herbert C. Young, Maria Young, Lorrilla A. Blackmar, William Blackmar, Lydia A. Sibley, Warren E. Sibley, Lydia Young, Alfred Young, Mary E. Young, Walter A. Young, William DeF. Aldrich, Jemima Aldrich, Willie Aldrich, Francello Young, and Victoria M. Worcester, and the residue to be disposed of under the fifth clause of the thirtieth item, should be distributed among said legatees in proportion to the sums given them respectively by the first sixteen bequests, except that the shares which would thus come to Warren E. Sibley, Victoria M. Worcester and Lydia Young, if living, should be distributed as intestate estate to the next of kin of said testator.

“The share of the residue taken by the Worcester Trust Company is to be held upon the same trusts that govern the bequest of \$15,000, given to it in the second item of said will.”

The defendants M. Louise Turner, Alfred Young, and two charitable corporations appealed from the decree.

The appeal came on to be heard before *Rugg, J.*, who reserved it for determination by the full court.

T. H. Gage, for the Worcester Trust Company, executor, stated the case.

W. E. Sibley, C. H. Sibley & C. M. Blair, for M. Louise Turner, submitted a brief.

F. N. Thayer, for Alfred Young.

D. W. Lincoln, (*C. H. Derby* with him,) for the Worcester Trust Company, trustee, and for the Worcester Children's Friend Society.

E. T. Esty, for the Home for Aged Men, submitted a brief.

SHELDON, J. 1. It is rightly agreed by all parties that the legacies given by the eighth, ninth and seventeenth clauses of the will to Warren E. Sibley, Lydia Young and Victoria M. Worcester have lapsed; that to Mrs. Young because she was not a relation of the testator within the meaning of R. L. c. 185, § 21; *Esty v. Clark*, 101 Mass. 86; *Kimball v. Story*, 108 Mass. 382, 385; *Horton v. Earle*, 162 Mass. 448; *Curley v. Lynch*, 206 Mass. 289; and the others because neither of these two legatees left issue. *Frost v. Courtis*, 167 Mass. 251. The amounts of these legacies fall into the residue and become a part of the amount to be distributed under the fifth clause of the thirtieth article of the will. *Dresel v. King*, 198 Mass. 546.

2. This fifth clause of the thirtieth article of the will is strictly residuary. It disposes of whatever residue may be left by ordering that "to be divided among the first sixteen legatees named" in the will, "in proportion to the several amounts given to each." This is a bequest as directly to those sixteen individuals and no others as if they were specified by name, instead of being identified by the order in which they are named in the will. It is not such a disposition as was made in cases relied on by some of the defendants in which beneficiaries were identified by description only and not by name, and, because a will speaks as of the time of the testator's death, it was held that those must take who answered to the description at that later time and not those who answered to it only at the time when the will was made.* Or, more exactly, it is the first sixteen legatees who are named in the will, whether they actually take under it or not, who are described here and who really answer to the testator's description both at the time of his making his will and at that of his death.

It is also plain that these sixteen legatees take their shares of the residue severally, and not as a class. As in *Sias v. Chase*, 207 Mass. 372, 375, "they are relatives and friends of the testator, to all of whom legacies had been given in the earlier part of the will." As in *Sohier v. Inches*, 12 Gray, 385, the gift is to each one absolutely, and in legal effect is made to each by name

* *Miles v. Boyden*, 3 Pick. 213. *Howland v. Slade*, 155 Mass. 415. *White v. Massachusetts Institute of Technology*, 171 Mass. 84. *Pierce v. Knight*, 182 Mass. 72, 79. *Viner v. Francis*, 2 Bro. C. C. 658. *Lincoln v. Pelham*, 10 Ves. 166.

(*Jones v. Crane*, 16 Gray, 808), and there are no words importing survivorship. A division is to be made in stated proportions among them, which of itself indicates that they are to take neither as joint tenants nor as members of a class, and that there is to be no increase by survivorship among them. *Frost v. Courtis*, 167 Mass. 251. *Lombard v. Boyden*, 5 Allen, 249. *Lyman v. Coolidge*, 176 Mass. 7. *Shattuck v. Wall*, 174 Mass. 167, 169. *Stanwood v. Stanwood*, 179 Mass. 223, 226. *Loomis v. Gorham*, 186 Mass. 444.

8. It follows from these considerations that each one of the residuary bequests to Mrs. Young, Sibley and Mrs. Worcester, lapsed like their general legacies. *Best v. Berry*, 189 Mass. 510, 512, and cases cited. The question arises how the amount of these bequests is now to be distributed. The general rule to be applied in such cases is well settled and is scarcely disputed. It was succinctly stated by Lathrop, J., in *Lyman v. Coolidge*, 176 Mass. 7, 9: "Where a legacy lapses which is part of the residue, it cannot, according to our decisions, fall into the residue because it is itself a part of the residue, and it must pass as intestate estate." In *Dresel v. King*, 198 Mass. 546, a case closely resembling in principle the one now before us, *Lyman v. Coolidge* was quoted with approval, and the same rule was applied. The same result has been reached in other cases, both here and elsewhere. *Hooper v. Hooper*, 9 Cush. 122. *Solier v. Inches*, 12 Gray, 885, 887, in which this court said of such a bequest: "It certainly cannot fall into the residue, because it was itself a part of the residue. It must therefore pass to the heirs at law as undevised estate." *Jones v. Crane*, 16 Gray, 808. *Lombard v. Boyden*, 5 Allen, 249, 251, in which after a clear statement of the rule it is said that in such a case "the share of one who dies in the life of the testator . . . will pass to the next of kin, under the statute of distributions." *Frost v. Courtis*, 167 Mass. 251. *Powers v. Codwise*, 172 Mass. 425. *Oolt v. Colt*, 38 Conn. 270. *Floyd v. Barker*, 1 Paige, 480. *Craighead v. Given*, 10 S. & R. 851. *Crawford v. Mount Grove Cemetery Association*, 218 Ill. 399. *Ackroyd v. Smithson*, 1 Bro. C. C. 508.

It may be granted, as was said in *Lombard v. Boyden*, 5 Allen, 249, and *Best v. Berry*, 189 Mass. 510, that this rule would not prevail against a manifest intention of the testator that such

a lapsed residuary bequest, instead of being treated as intestate property, should go to increase the shares of other residuary legatees. But upon examination of this will in all its parts and consideration of the able arguments which have been addressed to us we have not been able to find the expression of such an intent in the language used. It is not enough that he had, as undoubtedly he did have, a general intent to dispose of all his property by his will. That was so in many of the cases already referred to. Such an intent was found by the court in *Dresel v. King*, 198 Mass. 546. In that case, as in this, the difficulty is that in the events which have happened he has made no disposition of the amount of these lapsed legacies; and the court cannot make one for him. *Sanger v. Bourke*, 209 Mass. 481, 486, 487. The case at bar differs from those which have been relied on in argument. In *Smith v. Haynes*, 202 Mass. 581, and *Swallow v. Swallow*, 166 Mass. 241, the bequests were to beneficiaries who were held to constitute a class, among the members of which there would of course be survivorship. Other cases turned upon the evident intent of the testator.

The pecuniary legacies given in the earlier part of the will to Lydia Young, Warren E. Sibley and Victoria M. Worcester fall into the residue; and the residue thus increased is to be divided among the first sixteen legatees named in the will as written, except that the shares of the residue which thus would come to these three deceased legatees are to be distributed as intestate estate to the next of kin of the testator.

4. One of the legacies which thus will be increased is that given by the second clause of the will. The will gives this to the Worcester Trust Company, but in trust to pay the income to the testator's sister Mrs. Turner for her life, with a discretionary power to the trustee, if "the income shall be insufficient at any time to provide for all her necessities and reasonable comforts," to pay to her so much of the principal as may be needed therefor. The trustee is directed to exercise discretion in her favor. She is also authorized to dispose of the fund itself by will; but if she does not do so, the fund at her decease is to go to the testator's heirs. She now contends that she is the legatee mentioned in this clause of the will, and that she is entitled personally to receive the corresponding share in the residue. But we are

unable to adopt this view. Technically, the Worcester Trust Company is the legatee, though in trust for her. She can receive no part of the principal of the fund, except in the discretion of the trustee as already mentioned. That this discretion is to be exercised in her favor is far from giving her an absolute right to demand and receive the fund itself. And, if she should die intestate, the fund will revert to the testator's own heirs. She has merely an equitable life estate with a power of disposition by will. We do not overlook the fact that the testator in the first clause of the thirtieth article of his will speaks of the legacy as one to her; but we cannot see that he intended the increment which might come from the residue of his estate to take a different course or to become any more fully hers than the principal legacy to which it was appended. The case presented is not like *Parker v. Iasigi*, 188 Mass. 416. It is more like *Iasigi v. Iasigi*, 161 Mass. 75, and *O'Brien v. Lewis*, 208 Mass. 515. See also *Matter of Logan*, 131 N. Y. 456, and *Crawford v. Mount Grove Cemetery Association*, 218 Ill. 399.

The decree of the Probate Court was correct, and a decree should now be entered in accordance therewith.

So ordered.

COMMONWEALTH vs. MANOOG SHOOSHANIAN.

Worcester. October 2, 1911. — October 17, 1911.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DECOURCY, JJ.

Perjury. Evidence, Competency: at trial for perjury of alleged perjured testimony, of substance of conversation in foreign language. *Practice, Criminal, Conduct of trial:* offer of proof.

At the trial of an indictment for perjury, alleged to have been committed by the defendant in testifying in his own behalf at the trial of a civil action in which he was the plaintiff, a witness who was present at the trial of the civil action can be allowed to testify to the material portion of the testimony of the defendant given at that trial, although he is not able to state in substance all of the testimony given by the defendant in his own behalf in the civil action. In the present case it did not appear that the witness did not remember the whole of the portion of the defendant's testimony which was alleged to be perjured, but it was intimated that in a prosecution for perjury a witness who remembers distinctly a part of the alleged perjured testimony may be allowed to testify

to that part although he does not remember all of the testimony of the defendant on the subject in question, leaving the other parts of the alleged perjured testimony to be proved by other witnesses.

In this Commonwealth a witness in a criminal case may be allowed to state in English the substance of a conversation which he had with the defendant in a foreign language.

Where at the trial of a criminal case the defendant makes an offer of proof, containing various matters which are clearly too remote to be admissible, the presiding judge properly may exclude the evidence, thus offered as a whole, without separating it into parts and passing upon the admissibility of each part separately.

INDICTMENT FOR PERJURY, found and returned on August 17, 1910, charging that the defendant at Worcester on June 28, 1909, at the trial of a civil action brought by the defendant against one Manoog H. Shooshanian, was sworn as a witness and wilfully testified falsely, upon a material issue, that Manoog H. Shooshanian owed him the sum of \$250.

In the Superior Court the defendant was tried before *Fox, J.*

The Commonwealth called as a witness Manoog H. Shooshanian, who was the defendant in the civil case referred to. It appeared that he was present at the trial of that case and heard the present defendant, who was the plaintiff in that case, testify as a witness therein in his own behalf. It appeared that the witness Manoog H. was not able to state, and did not undertake to be able to state, in substance and effect, all of the testimony given by the present defendant in his own behalf in the trial of the civil case. Whereupon the counsel for the present defendant objected to the witness Manoog H. testifying unless he was able to give all of the testimony of the present defendant in the trial of the civil case in substance and effect. Against the objections and exceptions of the defendant, the witness was allowed to testify and did testify as to two questions, only, which were asked and answered by the present defendant as the plaintiff in the civil trial.

The questions which the witness was asked and answered were as follows: "Q. Was he (this defendant) asked how much you owed him? A. Yes, and he said that I owed him \$250. Q. Was he asked if you (the witness Manoog H. testifying) had paid him (this defendant) anything? A. Yes, and he said I had not paid him any of the \$250."

The witness Manoog H. was an Armenian who spoke English.

The defendant Manoog was an Armenian and testified in Armenian. The Commonwealth did not, before calling the witness Manoog H., nor at any time during the trial, call the interpreter who interpreted the testimony of the plaintiff in the civil trial, the defendant in this case, nor the stenographer who took the evidence at such civil trial, nor was their absence in any way accounted for.

The counsel for the defendant, after the witness Manoog H. had so testified, moved that all of that portion of this testimony in which he attempted to repeat what the defendant had testified to at the trial of the civil case be stricken from the record. This motion was made on the ground that the witness had not given nor undertaken to give in substance and effect all of the testimony of this defendant in the trial of the civil case. The judge denied the motion, and the defendant excepted.

Later in the trial the defendant took the stand in his own behalf, and, being then examined through an interpreter, was asked on cross-examination by the district attorney and answered as follows: Q. "Now did you say in answer to a question by Mr. McMahon, 'How much does he owe you now,' to which you reply '\$250.' Did Mr. McMahon ask you that question, and did you make that reply?" A. "The time when he got the judgment against him?" Q. "Yes." A. "Yes, he did."

The Commonwealth later called one Jacob Ashjian as a witness. It appeared that on February 12, 1910, Ashjian was coming on a train from Boston to Worcester with the defendant, and that he and the defendant were talking about the trial of the civil case which had taken place on June 23 and 24, 1909. It further appeared that both Ashjian and the defendant were Armenians, and that this conversation between the witness Ashjian and the defendant was entirely in the Armenian language; that the defendant could neither speak nor understand English intelligently; and that during the trial of this indictment against him an interpreter was used when the defendant was giving his testimony. This appearing, the witness Ashjian was asked the following question by the district attorney: "Q. Now, Ashjian, begin at the beginning and tell the conversation. Start from the time you got on the train and began to talk with Manoog (meaning the defendant) and tell the

talk you had there on the train." The counsel for the defendant objected upon the following grounds: "That when the witness comes to that part of the conversation which he had with the defendant, which the Government claims is an admission by the defendant that his testimony given at the trial of the civil case was false testimony,—my point is that that must be given in the Armenian language; that this man cannot be his own interpreter of it, nor the defendant held by his interpretation; and if it is given in the English language, if your honor allows it, will you allow my exceptions to be noted and saved?" The witness then was allowed to answer the question.

The defendant also excepted to the exclusion by the judge of evidence offered by the defendant of certain proceedings on the part of the witness Manoog H. Shooshanian. The defendant's offer of proof in regard to this matter is described in the opinion.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

M. M. Taylor, for the defendant.

J. A. Stiles, District Attorney, (*E. T. Esty*, Assistant District Attorney with him,) for the Commonwealth.

HAMMOND, J. 1. The evidence of the witness Manoog H. Shooshanian was properly admitted. It was not necessary that he should have been able to state "all of the testimony given by this defendant in his own behalf in the trial of the aforesaid civil case." It was, to say the least, sufficient for the witness to be able to remember all the defendant said on the particular point to which the witness testified. *Rex v. Rowley*, 1 Moody, C. C. 111. See also remarks of Shaw, C. J., in *Warren v. Nichols*, 6 Met. 261, 267. It did not appear that the witness did not thus remember. We do not mean to intimate however that in a prosecution for perjury a witness who remembers distinctly a part of the alleged perjured testimony must be excluded because he does not remember all that was said on that point. Doubtless the defendant is entitled to have shown all the testimony given by himself on the point, but it would seem to be sufficient generally if this was shown by means of various witnesses each remembering only a part, and the parts constituting the whole.

See for an extended discussion of this branch of the law Wigmore on Ev. §§ 2099, 2100.

2. There was no error in permitting the witness Ashjian to state in English the substance of the conversation between him and the defendant held in a foreign language. "The narration, in English, . . . was covered by his oath as a witness. It is only when testimony, given in a foreign tongue, requires translation in court, that an interpreter is sworn specially for that purpose." *Commonwealth v. Kepper*, 114 Mass. 278. Such is the well settled practice in this Commonwealth, whatever may be the practice elsewhere.

8. The offer of proof of certain proceedings on the part of the witness M. H. Shooshanian as tending to show that he had attempted to intimidate the defendant was rightly rejected. The offer was to show these acts as a connected whole. Certainly the facts that the witness had given a bond in the equity proceeding brought to enforce the civil judgment against him, that he then made a complaint to the district court charging Peter Yajian with subornation of perjury in the original action, that he sought a review of the original action upon the ground of perjury and that there was subsequently a suit of Simon Shooshanian against the witness were too remote; and, the offer being made as a whole, the court of its own motion was not bound to separate it into parts and pass upon each part separately.

The offer was not to show bias or animosity on the part of the witness, and the defendant was not precluded from offering any of these facts singly to show such bias or animosity and to obtain the ruling of the court thereon.

Exceptions overruled.

210-210
211-446
216-560
214-73

BOSTON AND MAINE RAILROAD vs. WILLIAM J. HUNT.

Worcester. October 2, 1911. — October 17, 1911.

Present: RUGG, C. J., HAMMOND, BRALEY, & SHELDON, JJ.

Railroad, Taking land by eminent domain. *Easement*, Extent of taking by eminent domain. *Equity Jurisdiction*, To enjoin continuance of repeated trespasses. *Trespass*, When restrained by injunction. *Equity Pleading and Practice*, Report, Appeal.

Under our statutes the taking by a railroad corporation by right of eminent domain of land for the making and maintaining of its road is substantially absolute so long as the land is used by the corporation or its lawful successors for the purposes of a railroad, and the damages given for the taking are assessed upon the theory that the occupation will be permanent and practically exclusive.

Under Gen. Sts. c. 68, § 21, which provided that a railroad corporation should "pay all damages occasioned by laying out and making and maintaining its road," the taking of a meadow with a brook running through it included the right of flowage for all purposes, and the damages paid for such a taking must be held to have included compensation for the loss of any such right.

In a suit in equity by a railroad corporation to enjoin the defendant from flooding his meadow in such a manner as to cause the water to flow on the railroad location of the plaintiff and to endanger the embankment on which one of its tracks was laid, it appeared that the defendant had no right to flood his land in the manner complained of, and that the defendant had committed trespasses by such floodings on five occasions, of which the last two were in successive years and continued for periods of some months. The judge who heard the case found that there had been no perceptible impairment or disintegration of the railroad embankment by the action of the water as raised by the defendant, but found that there was occasion for solicitude in regard to the safety of the embankment and the railroad track supported by it. *Held*, that an injunction should be granted to prevent the continuance of repeated trespasses.

A court of equity will interfere to prevent the continuance of repeated trespasses to real estate under a claim of an adverse right persistently asserted, although the wrongful acts separately may not have impaired materially the use and enjoyment of the property affected.

In a suit in equity, which had been reported by a judge of the Superior Court for determination by this court upon a memorandum of decision made by him, it appeared by the record that, after the memorandum of decision was filed, a decree for the plaintiff, which had been ordered by the judge, had been entered as a final decree and that the defendant had appealed. This court, after deciding that the plaintiff was entitled to a decree, *held*, that, although, as the case had been reported, the decree should not have been entered before the decision of this court, yet the defendant's appeal gave this court jurisdiction, and it was ordered that the decree be affirmed.

BILL IN EQUITY, filed in the Superior Court on April 6, 1909, by the Boston and Maine Railroad, as successor to the rights of

the Massachusetts Central Railroad Company, to enjoin the defendant from flooding a meadow belonging to him in Rutland in such a manner as to cause the water to flow on the railroad location of the plaintiff and to endanger the embankment on which one of its tracks was laid.

In the Superior Court the case was heard by *Aiken*, C. J., who made an order for a decree that an injunction should issue, and reported the case for determination by this court upon a memorandum of decision and a finding of facts made by him, which he stated to be all the facts material. If the decree was right it was to stand; if the decree was wrong, the bill was to be dismissed.

The memorandum of decision was as follows:

"The premises involved in this controversy are a meadow through which flows a brook. Thirty-eight years ago the Massachusetts Central Railroad by a taking under statute acquired a location five rods wide across this meadow, and on the location constructed an embankment eight feet in height on which tracks were laid, constituting a part of the through line of the railroad, over which trains have since continued to run. The plaintiff has succeeded to the rights of the Massachusetts Central Railroad and has maintained a train service, passenger and freight, over the embankment in the course of its regular business as a carrier. Previous to the taking of the location by the railroad first named the meadow had been a basin whereon by means of an artificial dam, from five to seven feet high, a pond was formed, and the waters accumulated were discharged at the dam into the brook below whence they flowed to a mill pond some distance down the stream and furnished the power that turned a mill. This mill was abandoned years ago, but whether before or after the taking of the location for railroad purposes did not appear.

"The defendant after he became the owner of the meadow, which was in 1892, removed portions of the dam, in particular, the flume which discharged the waters from the pond, the removal of this flume being three years after he acquired title. Portions of the dam, the sills for instance, still remained in position at the time of the hearing of the case in 1909. On five occasions while the defendant has been the owner of the meadow

he has, by placing obstructions in the brook at the site of the dam, flooded the meadow for the purpose of fostering the cranberries that grew spontaneously on the meadow or to make a pond for skating or to improve the meadow as he contended. These floodings did not occur in successive years, with the exception of the last two which were in the autumn and winter seasons of 1907 and 1908. The floodings in 1907 and 1908 continued on each occasion for periods of some months and were the only occasions which gave the servants and construction engineers of the plaintiff any concern. On these two occasions the defendant by placing railroad ties in the brook at the site of the dam raised the water about two feet and a half above what would have otherwise been its level, and caused the water to flow back upon and within the limits of the railroad location to a depth of fourteen inches and a width of fourteen feet for considerable distances, and also caused the water to come in contact with the foot of the embankment slope on one side. On neither of the two occasions was the water raised by the defendant to the height it used to stand at when the artificial dam created the pond previously mentioned, the water as raised by the defendant standing at a level two to four feet lower than the former pond level.

"While there has been no perceptible impairment or disintegration of the railroad embankment by the action of the water as thus raised by the defendant, I find that there is occasion for solicitude in respect to the safety of the embankment and the railroad track supported thereon. Paving or riprapping would protect the embankment sufficiently; the better course, however, is to remove the cause of the trouble as the plaintiff is bound to use the highest care and diligence to guard against such dangers as can be anticipated and avoided by human care and foresight."

The Chief Justice found that the plaintiff was entitled to an injunction and directed that the plaintiff should make a draft of a decree.

Later the Chief Justice made a final decree, which was entered, restraining the defendant from maintaining a dam or other obstruction upon his land in Rutland in such a way as to cause any part of the location of the Massachusetts Central Railroad Com-

pany or its successors to be overflowed. From this decree the defendant appealed.

C. W. Wood, for the defendant.

C. M. Thayer, for the plaintiff, was not called upon.

BRALEY, J. The report under which the case is before us is conclusive upon all questions of fact as the evidence has not been transmitted, and by its terms the Massachusetts Central Railroad, to whose rights the plaintiff has succeeded, acquired by eminent domain a location through the meadow or farm owned by the defendant. The right of way, even if defined as a public easement obtained by condemnation of the land, is substantially absolute so long as used for the purposes of a railroad by the corporation, or those succeeding by legislative sanction to its rights. *Barnes v. Boston & Maine Railroad*, 180 Mass. 388, 389. *Lorain Steel Co. v. Norfolk & Bristol Street Railway*, 187 Mass. 500, 502, 508. It is because of these characteristics of complete possession and control that damages for the taking are assessed upon the theory, that the occupation will be permanent and practically exclusive. *Presbrey v. Old Colony & Newport Railway*, 103 Mass. 1, 5.

The defendant's grantors at the time of the taking were entitled to "all damages occasioned by laying out and making and maintaining its road." Gen. Sts. c. 68, § 21. No reservations in their favor were made, and it must have been apparent, that the construction and maintenance of the road would encroach for the width of the location upon the area which could be flowed. The right of flowage for agricultural purposes, or for the cultivation or nourishment of cranberries, under St. 1866, c. 206, now R. L. c. 196, § 39, or to furnish mill power, having been injuriously affected, the owners could have recovered compensation under the statute, to be assessed in connection with such additional damages as the premises had sustained. *Davidson v. Boston & Maine Railroad*, 3 Cush. 91. *Tucker v. Massachusetts Central Railroad*, 118 Mass. 546, 547. *Drury v. Midland Railroad*, 127 Mass. 571. *Fitz v. Nantasket Beach Railroad*, 148 Mass. 35. *Fales v. Easthampton*, 162 Mass. 422.

The company having taken and paid for the location, the defendant, who neither by purchase nor by adverse user had gained a prescriptive title on the facts reported, could not lawfully over-

flow any portion without the plaintiff's consent. By causing the waters of the brook to be set back to a height sufficient to infringe upon it, he became a trespasser. *Cheney v. Barker*, 198 Mass. 356. *Menut v. Boston & Maine Railroad*, 207 Mass. 12. The injury resulting, although found to have been inconsiderable, arose from the exercise of an adverse right persistently asserted before the filing of the bill, and which the defendant now contends he should be permitted to enforce. It is unnecessary in order for the plaintiff to obtain injunctive relief, that the evidence must show that irreparable injury has been caused, or is reasonably to be anticipated. A court of equity will interfere to prevent the continuance of repeated trespasses, where the wrongful acts when viewed separately, may not have materially impaired the use and enjoyment of the property affected. *O'Brien v. Murphy*, 189 Mass. 353, 357.

The decree ordered was in accordance with what we have said, and protects the plaintiff, but it should not have been entered, as the case had been reported. The defendant's appeal, however, gives us jurisdiction, and the decree should be affirmed. *Hildreth v. Thibodeau*, 186 Mass. 83, 84.

Ordered accordingly.

JOHN J. KENNEDY, administrator, vs. WORCESTER CONSOLIDATED STREET RAILWAY COMPANY.

Worcester. October 2, 1911. — October 17, 1911.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DECOURCY, JJ.

Negligence, Due care of plaintiff, Street railway.

In an action by an administrator against a street railway corporation for causing the death of the plaintiff's intestate, it appeared that the intestate had alighted from a car of the defendant and passed back of it to cross the parallel track of the defendant's road, and that almost immediately as he stepped on that track he was struck and killed by a car of the defendant coming from the opposite direction from that in which he had been travelling. There was evidence that just before alighting he looked up the street to see whether a car was coming and saw none, and it was agreed that at the place of the accident one could see for a distance of a thousand feet in the direction from which the car that struck the plaintiff's intestate came. *Held*, that, if the car that struck the plaintiff's intestate was in sight when he looked, he must have looked carelessly not to see

it, and that, if it was not in sight, it must have been hidden by the car from which the plaintiff alighted and he must have been aware of the obstruction to his vision and yet have chosen to go upon the other track without further concern and to put himself in such a position that when he saw the danger there was no way to escape, and, therefore, that there was no evidence for the jury that the plaintiff's intestate at the time of the accident was in the exercise of due care. One, who on alighting from an electric street car passes behind it and immediately starts to cross a parallel track of the street railway, on which he knows that a car may come at any moment, without taking any heed to see whether such a car is coming, and steps upon this track so nearly in front of an approaching car that an accident is inevitable, is negligent as matter of law.

TORT by the administrator of the estate of James J. Kennedy, late of Worcester, for causing the death of the plaintiff's intestate from injuries sustained by him on June 3, 1908, by reason of the alleged negligence of the servants and agents of the defendant in the operation of its street railway. Writ dated December 21, 1908.

In the Superior Court the case was tried before *Fessenden, J.* The material facts shown by the plaintiff's evidence are stated in the opinion. At the close of the plaintiff's evidence the judge ordered a verdict for the defendant; and the plaintiff alleged exceptions.

The case was submitted on briefs.

J. A. Thayer, for the plaintiff.

C. C. Milton, for the defendant.

SHELDON, J. The plaintiff's intestate left an outward or southbound car of the defendant, went around the back of the car, attempted to cross the tracks, and was struck upon the further track by a car going northward toward Worcester, receiving the injuries which caused his death. It is contended that he was not in the exercise of due care. He was struck by the northbound car almost immediately after stepping upon the further track.

If he went behind the car from which he alighted without looking to see whether a car was coming upon the other track, without concerning himself with that question, but taking his chances of the motorman of such other car seeing him and stopping in season to avoid running into him, plainly he was not exercising due care. *Madden v. Boston Elevated Railway*, 194 Mass. 491. *Casey v. Boston Elevated Railway*, 197 Mass. 440. *Cohen v. Boston Elevated Railway*, 202 Mass. 66. *Willis v.*

Boston & Northern Street Railway, 202 Mass. 463. But there was evidence that just before alighting he looked up the street to see whether a car was coming, and saw none. In view however of the fact which, because the plan mentioned at the end of the exceptions had been lost, was agreed at the argument in this court, that at the place of the accident one looking south along the tracks could see for a distance of a thousand feet, it is manifest that either the car that struck him must have been in plain sight when it was contended that he looked, or it must have been in such a position as to be hidden from sight by the car in which the intestate then was. In the former case, either the intestate did not look at all, or he must have looked carelessly. *Donovan v. Lynn & Boston Railroad*, 185 Mass. 533, 534, 535. *Fitzgerald v. Boston Elevated Railway*, 194 Mass. 242, 243. *Birch v. Athol & Orange Street Railway*, 198 Mass. 257. *Haynes v. Boston Elevated Railway*, 204 Mass. 249. In the latter case, he must have been aware of the obstruction to his vision, and yet he chose to go upon the other track and without further concern to put himself in such a position that when he saw the danger he had no way of escape. *Stackpole v. Boston Elevated Railway*, 193 Mass. 562, 564. *Callaghan v. Boston Elevated Railway*, 200 Mass. 450. *Tognazzi v. Milford & Uxbridge Street Railway*, 201 Mass. 7. *Cohen v. Boston Elevated Railway*, 202 Mass. 66.

In most of the cases relied on by the plaintiff, the injured person had taken some precautions for his own safety, such as, with the care from others that he had a right to expect them to exercise, a jury was warranted in finding to be all that ordinary prudence on his part required. *Kinsley v. Boston Elevated Railway*, 209 Mass. 467, 468, 469. Here, he was put on his guard; for he knew of the other track; he knew that the coming of a car upon that track might happen at any moment; and he stepped upon the track so nearly in front of the car that the accident was inevitable. This appears from the fact that he said to the physician who attended him, that "as he got off and came around back of it [the car] he was struck by the other car," that "as soon as he came around the car the car was upon him;" to Callahan, "The first thing I knew I was struck by the Springfield car;" and to his father, that "he got off the car, went around the rear and was struck like a flash."

Without considering the somewhat doubtful question of negligence in the operation of the defendant's car, the majority of the court are of opinion that it could not have been found that the plaintiff's intestate was in the exercise of due care. The verdict for the defendant was rightly ordered.

Exceptions overruled.

PAUL KERSHISHIAN vs. NAPOLEON B. JOHNSON.

Worcester. October 2, 1911. — October 17, 1911.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DECOURCY, JJ.

Equity Jurisdiction, To enjoin continuing trespass, Mandatory injunction, Laches.
Equity Pleading and Practice.

One, who has attempted to interfere with the rights or to appropriate the property of an owner of land and has changed the condition of the owner's real estate without right, without excuse and without being misled by the speech, silence or conduct of the owner, can be compelled by a suit in equity to undo so far as possible that which he wrongfully has done affecting the owner and to pay damages.

If a landowner employed a builder to erect a building for him and gave to him only a general direction not to get over the boundary line, and the builder did not employ a surveyor to show him where the boundary line was but shored up and adopted as the line an old fence, which was irregular and dilapidated and never had been regarded as marking the correct boundary line, and, having represented the fence to be the true boundary line to the owner of the adjoining land, who, relying upon the representation, did not object to it, erected the building in part upon land of the adjoining owner, in a suit in equity by a successor to the title of the adjoining owner seeking a mandatory injunction directing the removal of the building from the plaintiff's land, the landowner who employed the builder cannot rely in defense, as showing that he acted in good faith and merely made an honest mistake in which the plaintiff's predecessor shared, upon the fact that he gave the general direction to the builder not to get over the boundary line.

The owner of certain land desired in 1905 to erect a building which was wider than could be included in the land and sought to purchase from the adjoining owner sufficient land to permit him to carry out his purpose and, the adjoining owner refusing to sell, he directed a builder, whom he had employed, to erect a building narrower than the one originally intended, and instructed him not to get over the boundary line. The builder, without procuring the assistance of a surveyor, made no especial effort to find the boundary line, but shored up an old, irregular and dilapidated fence, which never had been regarded as showing the line, and adopted it as a boundary, and then called the adjoining owner's attention to it, who accepted an assurance of the builder that the fence was on the boundary line and that the proposed building would not encroach on the line, and said that the location was all right if it did not go over on his estate. The builder

thereupon in 1905 erected a building thirty-two feet long which, exclusive of the overhang of the eaves, encroached upon the adjoining land four feet at one end and two feet at the other. In 1907 the adjoining owner sold his property to one who in 1908 caused his land to be surveyed and then discovered for the first time the building's encroachment, and on April 23, 1909, brought a suit in equity seeking a mandatory injunction directing the removal of the building from his land. It appeared that it would cost the defendant \$500 to remove his building. Held, that it did not appear that the plaintiff had been guilty of laches, that the defendant had not shown that in encroaching on the plaintiff's land he had acted in good faith and innocently, or that he had been misled by any silence, statement or conduct of the plaintiff or of his predecessor, and therefore that the plaintiff was entitled to the mandatory injunction which he sought.

A defendant in a suit in equity cannot rely as of right upon a defense that the plaintiff has been guilty of laches sufficient to bar the suit unless he sets that defense up in his answer or in a plea.

RUGG, C. J. This is a suit in equity,* by which the plaintiff seeks to have removed a portion of a building erected on his land by the defendant. The ends of the boundary line between land of the plaintiff and that of the defendant were marked by iron stakes driven into the ground at least as early as 1869 and 1870, when the estates now owned by these parties were conveyed by a common grantor. One of these stakes was found by the master, who reported that the other had been removed or covered up by the structures of the defendant. The master further reported that "the defendant owned his premises for many years. Before 1905 there was one cottage thereon. In 1905 the plaintiff's premises were owned by a Mrs. Wallace, his immediate predecessor in title. In 1905 the defendant, Johnson, directed a builder to construct between the existing cottage and the premises now owned by the plaintiff another cottage twenty-two feet in width. Johnson was told by the builder that there was not space enough to build a cottage of that dimension. He tried to buy of Mrs. Wallace three feet of land but failed to do so and disagreed with her as to the boundary line. The proposed cottage was thereupon cut down to eighteen feet in width and the builder instructed by Johnson to build it and not to get over the line. The builder thereupon, without the assistance of any surveyor, proceeded to locate and erect the cottage and except as before stated Johnson knew nothing and did nothing

* Filed in the Superior Court on April 23, 1909. It was referred to T. Hovey Gage, Esquire, as master, and was reserved by Fox, J., upon the pleadings and the master's report for determination by this court.

about the location of the cottage or the determination of the line of his premises. . . . When the builder of Johnson's cottage, . . . began to construct the same he made no especial effort to find the boundary line as indicated by deed but shored up the old fence and assumed that it was then on the line. The builder then called out Mrs. Wallace who owned and lived on the plaintiff's premises to show her the proposed location of the cottage. . . . Mrs. Wallace said the location was all right if it did not go over on her estate; that she accepted the assurance of the builder based on his assumption of the position of the fence that the proposed cottage would not encroach upon her estate, and that during her ownership and occupancy of the plaintiff's premises, she continued to accept the builder's assurance. . . . The cottage was built within the location of the old fence as the builder had thus determined it. . . . Mrs. Wallace sold the premises in 1907 to the plaintiff and the plaintiff and Mrs. Wallace occupied the plaintiff's premises without remonstrance as to the location of the cottage until 1908. In 1908 the plaintiff had his premises surveyed for the first time and discovered the discrepancy in the boundary."*

1. It is a general principle that where a defendant, without right, without excuse, and without being misled by the speech, silence or conduct of the plaintiff, has attempted to appropriate the plaintiff's property or to interfere with his rights and has changed the condition of his real estate, the defendant is compelled to undo, so far as possible, that which he has wrongfully done affecting the plaintiff and to pay the damages. *Lynch v. Union Institution for Savings*, 159 Mass. 306, 308. *Harrington v. McCarthy*, 169 Mass. 492. *Downey v. Hood*, 203 Mass. 4. *Curtis Manuf. Co. v. Spencer Wire Co.* 203 Mass. 448. It is urged by the defendant that there has been an honest mistake about the boundary line, and that the plaintiff's predecessor in title shared in this mistake to such an extent that there ought to be no relief in chancery. The finding of the master, however, is to the effect that the old fence, upon which the defendant chiefly relies as the basis of mistake, was irregular and dilapi-

* The building erected was thirty-two feet long and encroached upon the plaintiff's land four feet at one end and two feet at the other, exclusive of the overhang of the eaves.

dated, and was never regarded by the parties as a boundary line, until the defendant's builder shored it up and represented it to Mrs. Wallace as the correct line. The builder in all negotiations respecting the location of the boundary line and of the building stood in the place of the defendant. The defendant's instruction to place the cottage on his land did not relieve him of responsibility to the adjoining landowner for acts done by the builder in pursuance of this authority. The defendant made no investigation to determine the position of the boundary line, but left the whole matter to his builder without taking any precaution to see that the trust thus reposed was executed rightly. A landowner who undertakes the erection of a building cannot excuse himself for trespass upon adjoining property by showing that he gave over the location of the building wholly to his builder with only a general direction to keep inside his boundary line. Responsibility in this respect cannot be shifted to a contractor. The location of a building is in its essence as to adjoining landowners the work of a proprietor, and whoever is empowered to do it, whether by contract or employment, is for this purpose the representative of the proprietor, by whose conduct the latter is bound, and for whom he is responsible. See *Gorham v. Gross*, 125 Mass. 282; *Bower v. Peate*, 1 Q. B. D. 821. Subsequent to the dispute as to where the boundary line was, the plaintiff's predecessor in title said to the defendant's builder that the building must not be placed on her land, and she relied on his representations that it was not so placed. She was lulled into security by his declaration. In this regard also the defendant was bound by the act of the carpenter. *Weeks v. Currier*, 172 Mass. 53, 55. Mrs. Wallace gave no assent whatever to the location of the building except one resting upon an assurance by the carpenter, which was materially untrue. Her rights and those of her successor in title are not adversely affected thereby. It is apparent, therefore, that the defendant fails to show that acting with reasonable precaution in good faith under an honest mistake he placed his building in part on the plaintiff's land, or that the plaintiff and his predecessor have misled the defendant to his harm by any act of commission or omission. The principle of law above stated is invoked rightly by the plaintiff.

2. The defendant has not set up the defense of laches in his answer. Hence he cannot now argue that defense as matter of right. *Stewart v. Joyce*, 201 Mass. 801. *Hawkes v. Lackey*, 207 Mass. 424, 430. Nor does any ground appear why such a defense should have been sustained even if open.

3. There is no reason why the plaintiff is not entitled to mandatory relief to the extent of requiring the removal of the defendant's building. The latter went forward in its construction without a survey, or a search for the bounds, or exercising sufficient care to ascertain the precise place of the boundary line. He took his chances in the location of his cottage after having tried in vain to buy land from the plaintiff's predecessor in title, and having had a dispute with her as to the line, and being told by her through his contractor that it must not encroach on her land, and after his agent, the carpenter, had misrepresented the location of the division line. Under these circumstances it cannot be said that acting in good faith and innocently, he inadvertently got over the line. It would be inequitable to compel the plaintiff thus to make an involuntary sale of his property to the defendant by requiring him to accept monetary damages. The fact that the defendant will be caused a large loss * by removing his building is no sufficient reason for requiring the plaintiff to part with his property against his will or for enabling the defendant to acquire an estate which he was unable to buy. It has been usual to grant injunctive relief in similar cases. *Codman v. Bradley*, 201 Mass. 361, and cases cited at 369. *Frost v. Jacobs*, 204 Mass. 1. *Stewart v. Finklestone*, 206 Mass. 28, 38. Cases where it has been refused, like *Levi v. Worcester Consolidated Street Railway*, 193 Mass. 116, *Methodist Episcopal Society v. Akers*, 167 Mass. 560, *Loud v. Pendergast*, 206 Mass. 122, and *Kendall v. Hardy*, 208 Mass. 20, are plainly distinguishable either in elements of unwarrantable delay or bad faith on the part of the plaintiff or good faith on the part of the defendant, which are lacking here.

Mandatory injunction to issue, with costs.

J. E. Swift, for the plaintiff.

W. C. Mellish, (*C. A. Cook* with him,) for the defendant.

* The master found that the cost of such a removal would be \$500.

MARY R. WARD vs. JOSEPH BLOUIN.

Worcester. October 2, 1911. — October 17, 1911.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DECOURCY, JJ.

Practice, Civil, Variance. Pleading, Civil. Landlord and Tenant. Negligence, Due care of plaintiff. Evidence, Competency.

In the declaration and in specifications filed by the plaintiff in an action by a married woman against the owner of a dwelling house for injuries suffered by her because of the alleged defective condition of a step which the defendant was bound to repair, the plaintiff alleged that the house was let to her. At the trial of the action her counsel in his opening address to the jury stated among other facts that the premises were let to her husband. A verdict was ordered for the defendant on the offer of proof contained in the opening statement, and the plaintiff alleged exceptions, at the argument of which in this court no question was raised by the defendant as to the apparent variance between the declaration and the offer of proof; and, because recovery by the plaintiff would not have been affected, whether she or her husband was the defendant's tenant, this court gave no significance to the variance except to call attention to its existence, but considered only whether, if the other facts, which the plaintiff had offered to show, had been proved the case should have been submitted to the jury.

At the trial of an action by a married woman against the owner of a three tenement house to recover for injuries alleged to have been caused by a defective condition of a step, the plaintiff's counsel in his opening statement to the jury offered to prove that the plaintiff's husband had inspected the house when it was not entirely completed and had selected one of the tenements, that he and the defendant had agreed upon a rent and that he should take possession when the defendant should notify him that the house was ready; that later, upon the defendant's notifying him that he could move in at any time, the plaintiff's husband brought a load of goods to the house, that it appeared that cement steps which were to be put in at the back of the house for common use of the occupants of all of the tenements were not yet constructed and that there were no steps there; that, the defendant's attention being called to the need of a step, he produced a box and placed it where the steps should be, stating "That will do for a while. I am going to get cement steps in in a few days"; that the box became inadequate and unsafe; that the defendant was spoken to by the plaintiff's husband and by others repeatedly about the condition of the box and each time gave some excuse and said that he would fix it in four or five days; that the plaintiff did not think that the box was as safe as steps would have been, but relied upon the assurance of the defendant that steps would be constructed in a few days, and that until that time she thought that she could get along with the box by using special care; that, a month after the box was placed in position, while the plaintiff was using it as a step and using special care, it moved and she was thrown down. Held, that on such facts, if proved, the jury would have been warranted in finding that the plaintiff's injury was due to a negligent failure by the defendant to keep the temporary step in as safe a condition as it was in when he put it there and that the plaintiff was in the exercise of due care.

At the trial of an action by a married woman against the owner of a three tenement house, one of the tenements of which was let to her husband, for injuries resulting from the defective condition of a box which the defendant had supplied to take the place of a step and which had remained in common use by the occupants of all of the tenements against their objection and because of repeated assurances by the defendant that he would construct the steps in a few days, it is competent on the question of the plaintiff's due care for her to testify that "she did not think that the box was as safe as steps would have been, but relied upon the assurance of the defendant that steps would be constructed in a few days, and that until that time she thought she could get along with the box by using special care and did use special care in stepping on to it on each occasion and on the occasion of the injury."

TORT for personal injuries alleged to have been caused by a defective step provided by the defendant for use at the back of a house which the plaintiff in her declaration alleged that she had hired from the defendant. Writ dated August 6, 1910.

Specifications were filed by the plaintiff in which also she stated that she was the defendant's tenant.

The case was tried before *Morton, J.*

The plaintiff's attorney in his opening address to the jury, after reading the pleadings, "offered to prove that in March, 1910, the husband of the plaintiff went to inspect a new tenement house . . . and talked with the defendant, who was the owner and landlord; that the house was not then entirely complete, the finishing was to be done, floors to be laid, and painting and papering to be finished; that in that conversation the plaintiff's husband picked out the tenement upon the second floor of the house, agreed upon the rental of the same, and that he would take possession when the defendant should notify him that the house was ready for occupancy; that the house was a three tenement house with a flat on each floor; that in the latter part of April the defendant met the plaintiff's husband and told him that the house was ready to be occupied; that they could move in at any time, and that other tenants would move into the premises; that on the eleventh or twelfth of April the plaintiff's husband and herself together with one Mrs. Kimball, . . . who was to occupy the flat above that of the plaintiff and her husband, started to move into the house; that they first took a load of lighter articles on an express wagon and when they arrived at the tenement drove to the back door to unload and then for the first time found that the steps to that door had not been com-

pleted; that the defendant had constructed cement block walls on each side of the door and filled in between them a quantity of ashes and cinders to prepare the way for cement steps; that there was a space of two and one half or three feet between the top of the ashes and the door sill; that when the Wards and Mrs. Kimball reached the back door, the women stepped off the express wagon on to the wall of cement blocks; that they could not step up from the wall to the door and that the husband of the plaintiff called the defendant who was present and called his attention to the situation; that the defendant then went to the cellar, got a box and placed it on top of the coal ashes, saying: 'That will do for a while. I am going to get cement steps in in a few days'; that the plaintiff and her husband and other tenants then moved into the building; that the box remained there something like a month and five or six days; that it wobbled and shook with the cinders under it and became worse as time went on; that it was not intended to be the permanent means of approach to that door; that the plaintiff's husband and other tenants called the defendant's attention to this insufficiency on two different occasions before the time of the plaintiff's injury, and that on each occasion he gave some excuse for not doing it at that particular time, but said that he would do it in four or five days; that the back door and this box were used in common by the three tenants in the building in reaching the back yard where the clothes lines were; that upon the nineteenth day of May, the plaintiff, living on the second floor, put her washing out in the back yard, [that later] she noticed something drop from the line and on to the ground and went down the back stair and out in the back hall, which was used in common by all the tenants, for the purpose of going out of the back door to pick up the article which had fallen from the clothes line, and stepped from the back door to the box which, as soon as she stepped on it, turned over and threw her violently to the ground causing her severe injuries."

The plaintiff also offered to prove that "she did not think that the box was as safe as steps would have been, but relied upon the assurance of the defendant that steps would be constructed in a few days, and that until that time, she thought she could get along with the box by using special care and did use

special care in stepping on to it on each occasion and on the occasion of the injury." The presiding judge ruled that the evidence set out in this paragraph would not be admissible.

The presiding judge ruled that, upon the pleadings and the offer of proof, no action could be maintained. He ordered a verdict for the defendant and reported the case for determination by this court, judgment to be entered on the verdict if the ruling was correct, and the case to stand for trial if the ruling was incorrect.

H. W. Blake, for the plaintiff.

D. I. Walsh & T. L. Walsh, for the defendant, submitted a brief.

SHELDON, J. No question has been made as to the apparent variance between the plaintiff's offer of proof and her declaration. Upon her offer of proof it was her husband and not herself who hired the tenement and became a tenant of the defendant. But this circumstance would not have prevented her from recovering upon a proper declaration if her husband could have recovered for a like injury to himself. *Wilcox v. Zane*, 167 Mass. 302. *Domenicis v. Fleisher*, 195 Mass. 281. We therefore consider the question upon its merits, as it has been argued by both parties.

The jury could find that the steps which the defendant was to put up and the box which he supplied for temporary use were, and were to remain, in his possession and control, and were intended for the common use of all the tenants in the house. If so, it was his duty, while the box remained in use as he had put it, to use reasonable care to keep it and the foundation of ashes and cinders upon which it rested in as safe a condition for its intended use as it was or appeared to be in when he put it there. *Looney v. McLean*, 129 Mass. 33. *Andrews v. Williamson*, 193 Mass. 92. But, as the plaintiff offered to show, it remained there for more than a month; it wobbled and shook upon the cinders under it and became worse as time went on. The defendant's attention was called to its insufficiency, and he gave excuses for doing nothing at that time, but said "that he would do it in four or five days." He still did nothing, although thus notified of the state of affairs; and finally, when the plaintiff was using the box as the defendant intended it to be used, it

turned over and threw her down, causing the injuries complained of. This would warrant a finding that the accident was due to a negligent failure on the defendant's part to keep the temporary step in as safe a condition as when he put it there, and so would entitle the plaintiff to recover if she was in the exercise of due care. The case would come within the rules laid down by our decisions. See for example *Lydecker v. Brintnall*, 158 Mass. 292, 297; *Robbins v. Atkins*, 168 Mass. 45; *Harrison v. Jelly*, 175 Mass. 292; *Lindsey v. Leighton*, 150 Mass. 285; *Cummings v. Ayer*, 188 Mass. 292.

That the defendant's duty to put up permanent cement steps rested merely upon his contract does not justify him in a negligent failure to keep the temporary substitute which he had provided from deteriorating and growing more unsafe than it was in the beginning. It was not a part of the construction or permanent arrangement of the premises, as in *Quinn v. Perham*, 151 Mass. 162, 163, *Moynihan v. Allyn*, 162 Mass. 270, *Phelan v. Fitzpatrick*, 188 Mass. 287, and other similar cases. The very fact that he allowed this merely temporary arrangement, intended to last only for a few days, to remain in use unattended to for more than a month, though aware of its growing insufficiency, might be found to show negligence. The liability which was enforced against a landlord in *Miles v. Janvrin*, 196 Mass. 481, and 200 Mass. 514, rested upon a contract. But the relation which in that case grew out of the contract between the parties, and by which the defendant was subjected to the burden of looking out for the safe condition of the leased premises, existed between these parties from the beginning, as to the steps and the substitute for them, by reason of the fact that they remained in the defendant's possession and control.

The jury could have found that the plaintiff was in the exercise of due care. *Faxon v. Butler*, 206 Mass. 500. *Frost v. McCarthy*, 200 Mass. 445. *Watkins v. Goodall*, 188 Mass. 533. *Dewire v. Bailey*, 181 Mass. 169. *Looney v. McLean*, 129 Mass. 83.

It was competent for the plaintiff to testify that she was using special care at the time she was injured, and that though she did not think the box as safe as the steps would have been, she relied upon the assurance of the defendant that steps would be

constructed in a few days, and thought until that time that she could get along with the box by using special care. This comes within the principle of *Malcolm v. Fuller*, 152 Mass. 160, and *Carriere v. Merrick Lumber Co.* 203 Mass. 322, 327.

New trial ordered.

WILLIS W. DAVIDSON vs. ALBERT W. STAFFORD.

Worcester. October 2, 1911. — October 17, 1911.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DeCOURCY, JJ.

Tax, Redemption, Agent of non-resident holder of tax title. Statute, Construction. Equity Jurisdiction, To redeem from a tax sale. Equity Pleading and Practice, Parties. Statute of Limitations.

Section 45 of R. L. c. 13, now St. 1909, c. 490, Part II, § 46, which provides for the registering in public records by the purchaser of a tax title of identifying information regarding himself, if and so long as he is a resident of the city or town where the land is situated, and the appointment of an agent and like registering of information regarding him in case the purchaser resides at the time of the sale, or within two years from the date of the sale comes to reside, outside of such city or town, being a statute designed to afford a way for persons, not infrequently poor or in-straitened circumstances, to relieve themselves from the hardship of the incumbrance of tax titles upon their land by redeeming it from the tax sales, is highly remedial in its nature and ought to be interpreted as liberally as the end in view permits with a just regard to the rights of honest and fair dealing purchasers at tax sales.

Section 45 of R. L. c. 13, now St. 1909, c. 490, Part II, § 46, which provides for the registering in public records by the purchaser of a tax title of identifying information regarding himself, if and so long as he is a resident of the city or town where the land is situated, and the appointment of an agent and like registering of information regarding him in case the purchaser resides at the time of the sale, or within two years from the date of the sale comes to reside, outside of such city or town, imposes positive duties upon the purchaser at a tax sale, a violation of which is or may be found to be a limitation upon his title against the owner at least to the extent of enabling a court of equity to inquire whether the circumstances of the case are such that good conscience requires that the owner be given an opportunity to redeem even after the expiration of two years, if suit is brought within the six years limited by St. 1909, c. 490, Part II, § 76.

A certain parcel of land was sold on October 29, 1907, at a tax sale by the collector of taxes of a town to one who was not a resident of the town. The purchaser did not comply with the requirements of R. L. c. 13, § 45, in that he did not appoint an agent residing in the town or in the place where the deed was recorded and did not file with the treasurer of the town or with the register of

deeds of the district where the deed was recorded any statement of his address or of that of any agent. At the time of the sale and for more than two years thereafter, the record title of the land, aside from the tax deed, stood in the name of a person who held it for the real owner. In the summer or early autumn of 1909, the real owner of the land first learned of the tax sale and at once sought to find the purchaser at the tax sale, but was unable to do so until October 17, 1909, when the purchaser stated, as the amount claimed by him to be due in order to redeem, a sum which included items which he was not justified in charging. The real owner refused to pay the amount demanded and when he sought the purchaser later was unable to find him until after October 29, 1909, and the real owner did not pay the amount required for redemption to the collector of taxes as he was permitted to do by R. L. c. 13, § 60, as amended by St. 1902, c. 443. On December 21, 1910, having become the holder of the record title, the real owner brought in the Superior Court a bill in equity to redeem the land from the tax sale, and the judge who heard the case ruled as matter of law that the plaintiff was not entitled to redeem, and made a decree dismissing the bill, from which the plaintiff appealed. *Held*, that the decree must be reversed, since the ruling that as matter of law the plaintiff was not entitled to redeem was erroneous and the judge of the Superior Court should have considered whether all the circumstances were such as to make it equitable that the plaintiff should be entitled to redeem.

If land, while standing in the name of a person who held it for the benefit of the real owner, was sold for non-payment of taxes and if, subject to the tax sale, it remained of record in the name of the same person for more than two years, when the record title subject to the tax sale was conveyed to the real owner, the real owner is the proper person to bring a suit in equity to redeem the land and, in order to avoid the bar of the lapse of the two years within which the land should have been redeemed, he may show a failure of the purchaser at the tax sale to record identifying and descriptive information as to his residence or that of his agent in accordance with St. 1909, c. 490, Part II, § 46.

RUGG, C. J. This is a suit in equity* to redeem from a tax sale. The judge of the Superior Court filed a memorandum of facts, which so far as material are that the plaintiff is the owner of land in Oxford subject to rights acquired under a tax deed given by the collector of taxes of the town of Oxford on October 29, 1907, to one Adams. Adams, not being a resident of Oxford, did not appoint an agent residing in Oxford, nor any agent in the place where the deed was recorded, and did not file with the treasurer of the town of Oxford nor with the register of deeds a statement of his residence and place of business, nor of the name, residence and place of business of any agent, all as required by R. L. c. 13, § 45 [now St. 1909, c. 490, Part II, § 46†]. The plain-

* The bill was filed in the Superior Court on December 21, 1910. The case was heard by *Hitchcock, J.*

† "Whoever has a title to land under a sale for non-payment of taxes or other assessment and is a resident of the city or town in which such land

tiff first learned of the tax sale in the summer or early autumn of 1909. Immediately he tried to find Adams, but did not succeed in meeting him until October 17, 1909. Adams then stated orally the amounts claimed by him to be due in order to redeem, which included items he was not authorized to charge. This was in violation of St. 1909, c. 490, Part II, § 60. Adams left Worcester, where he resided, on the following day, and the plaintiff, although making reasonable effort, could not pay or tender to him the amount required to redeem until after the expiration of two years from the tax sale. The plaintiff did not pay to the treasurer of the town of Oxford the amount which he would have been required to pay the purchaser as permitted by R. L. c. 18, § 60, as amended by St. 1902, c. 443, now St. 1909, c. 490, Part II, § 61.

Upon these facts the judge of the Superior Court ruled as matter of law, as we understand the memorandum, that the plaintiff was not entitled to redeem, and ordered that the bill be dismissed. The plaintiff's appeal presents for determination the correctness of this ruling.

It may be assumed in favor of the defendant that if Adams, the purchaser at the tax sale, had complied with the provisions of R. L. c. 18, § 45 (now St. 1909, c. 490, Part II, § 46, in substance set out above) as to filing in public records identifying information respecting himself or his agent, and requiring the appointment of a local agent by a non-resident purchaser, and if he had not demanded more than his due in violation of St. 1909, c. 490, Part II, § 60, the plaintiff would have no standing in equity, and his rights to redeem would be barred by the two year period of limitation set forth in St. 1909, c. 490, Part II, § 59.

lies, shall file with the treasurer of such city or town and in the registry of deeds, a statement of his residence and place of business, with the street and number, if any. Such person, who is not a resident of such city or town or who removes therefrom, shall appoint an agent residing therein, or in the place where the tax deed is recorded, authorized to release such land. He shall also file the statement above required in which he shall also state the name of such agent and his residence and place of business, with the street and number, if any. Whenever a person holding a tax title changes his residence or place of business or agent, he shall file a new certificate. Tender of payment to, and service of process upon, such agent shall be a sufficient tender to, or service upon, the holder of such tax title."

The effect between the parties of failure on the part of the purchaser to comply with said § 45 has been adverted to, but left undecided in *McNeil v. O'Brien*, 204 Mass. 594, 597, and *Connors v. Lowell*, 209 Mass. 111, 121. That point must now be decided. This statute was enacted first by St. 1882, c. 243, §§ 1 and 2, and has remained the same in substance in successive re-enactments. (See St. 1888, c. 390, §§ 45, 46; R. L. c. 13, § 45; St. 1909, c. 490, Part II, § 46.) Its purpose seems to have been to require such ease of access by a person entitled to redeem from a tax sale to the person from whom he has a right to redeem as to save him the annoyance and trouble of a protracted and uncertain search. It appears in part also to reflect a legislative distrust of the ingenuousness of purchasers at tax sales. Its enactment was not essential to some measure of protection of the person entitled to redeem, for a law had been on the statute books since 1848 permitting him to pay the money necessary to redeem to the town or city treasurer, in case he was unable to find the purchaser or his agent after reasonable search. See St. 1848, c. 166, §§ 6-8; Gen. Sts. c. 12, §§ 37, 38; Pub. Sts. c. 12, §§ 50, 51; St. 1888, c. 390, §§ 58, 59; R. L. c. 13, §§ 60, 61. The remedy in this regard has been enlarged by St. 1902, c. 443, now St. 1909, c. 490, Part II, §§ 60, 62. See *Rogers v. Nichols*, 186 Mass. 440. This remedy has been held repeatedly to be merely cumulative and not exclusive of others. *Clark v. Lancy*, 178 Mass. 460. *Barry v. Lancy*, 179 Mass. 112. *Perry v. Lancy*, 179 Mass. 183. *Rogers v. Nichols*, 186 Mass. 440. *McNeil v. O'Brien*, 204 Mass. 594. But there are limitations upon the effectiveness of the remedy furnished by this statute. Compliance with its terms would still leave outstanding upon the record the tax deed, although its effect would be neutralized by the certificate provided for in the statute. This in the minds of those not learned in real estate law might be a practical impairment of the ease of transferring title. The precise amount, to which the purchaser may be entitled, would remain undetermined. As matter of precaution it might be considered wise by a landowner to pay the largest amount which it would seem the tax purchaser would demand rather than to take the risk of not paying enough. The Legislature has made an effort to avoid this danger of the attempt at redemption failing for this reason by the last sentence of said

§ 62. But even then an action at law might be required to determine finally the correct amount. If the purchaser has been in possession and has collected rents and profits or has been compelled to repair, these items of account cannot be determined with accuracy except by interview, conference or action in the courts.* Hence it remains highly desirable that the person entitled to redeem should be able to find the purchaser, and get from him a correct statement of the amount required to be paid for redemption. A false statement in this respect, although only made a crime so far as the express letter of the statute goes (St. 1909, c. 490, Part II, § 60) may have important effects upon the civil rights of the interested parties who were intended to be directly benefited by its terms. *Bourne v. Whitman*, 209 Mass. 155, 169. *Berdos v. Tremont & Suffolk Mills*, 209 Mass. 489. The amounts involved in tax sales, although oftentimes relatively small, may bear with hardship upon those whose property is involved, and who not infrequently are poor or in straitened financial condition. The interpretation of statutes, designed to afford a way for people of this sort to redeem their property from a purchaser at a tax sale, and therefore highly remedial in their nature, ought to be as liberal as the end in view permits with a just regard to the rights of honest and fair dealing purchasers.

It does not appear as matter of law that any injustice will be wrought to the purchaser by holding the landowner entitled to bring a petition under these circumstances. The purchaser has failed in two particulars to comply with provisions of the tax law for the benefit of the landowner. One of these failures is matter of public record, so that everybody dealing with the title is charged with notice of it. There are no equities in his favor which prevent a full inquiry into the facts by a chancery court.

It has been held that a violation of § 45 does not invalidate the sale. *Connors v. Lowell*, 209 Mass. 111, 121. Unless a positive effect is given to the section by enabling the landowner to obtain equitable relief against a purchaser who has violated its terms, it will become for all practical purposes a dead letter. But such a result cannot be attributed to legislation of this

* It was alleged in the bill and admitted in the answer in this case that the defendant had cut and removed wood from the premises and was continuing to do so.

character, unless no other is reasonably possible. It is a remedial statute. Its evident aim was to aid the landowner in redeeming without annoyance and settling once for all every question arising out of the sale. Its purpose ought not to be frustrated. A plain way is open for an effective construction of its terms, and affording a substantial relief under it. These considerations lead to the conclusion that it was the intent of the Legislature, in enacting said § 45, to accomplish something more than a mere direction, whose terms could be violated with impunity by the purchaser. This section and said § 60 impose positive duties upon the purchaser, violation of which is or may be found to be a limitation upon his title against the owner, at least to the extent of enabling a court of equity to inquire whether the circumstances are such that good conscience requires that an opportunity be given to redeem, even after the expiration of two years, if suit is brought within the six years limited in St. 1909, c. 490, Part II, § 76. See *Widerrum v. Bender*, 172 Mass. 486. Although the plaintiff would have been barred by the two year statute of limitations contained in § 59 of the present tax law, if the purchaser had complied with the provisions of said § 45 intended to make plain to the owner the way to find the one from whom the redemption must be made, and had not attempted to collect more than the sum of money authorized by law as a condition of redemption contrary to the terms of said § 60, the violation of these statutory obligations by the purchaser opens the door for an inquiry into the whole situation in equity. The court below was not warranted in ruling as matter of law that the plaintiff could not redeem, but should have considered whether all the circumstances were such as to make it equitable that the plaintiff should be entitled to redeem.

There are many cases which hold that acts to be performed by the purchaser after the sale are in the nature of conditions subsequent, and must be strictly performed in order to perfect the title. See 2 Cooley on Taxation, (8d ed.) 1084 *et seq.*, and cases cited; 1 Blackwell on Tax Titles, (5th ed.) 570. These have arisen under statutes differing in material respects from ours, and it is not necessary to examine them in detail. The statute under consideration does not go so far as to hold a sale invalid

because of failure to comply with its terms. *Connors v. Lowell*, 209 Mass. 111, 121. The rights of the landowner are amply protected by construing our statutes as enabling him to redeem in equity in proper cases.

The fact that the plaintiff was not the record owner of the real estate at the time of the sale* does not prevent him from maintaining this suit. *Rogers v. Lynn*, 200 Mass. 854.

Decree reversed.

The case was submitted on briefs.

H. H. Lepper, for the plaintiff.

J. A. Thayer, C. B. Perry & P. D. Howard, for the defendant.

HONORA DRISCOLL & another vs. INHABITANTS OF
NORTHBRIDGE.

MARY DRISCOLL & others vs. SAME.

222-96
253-310

Worcester. October 3, 1911. — October 17, 1911.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DECOURCY, JJ.

Tax, Sewer assessment, Assessment of benefits. Practice, Civil, Auditor's report.

A petition under R. L. c. 49, § 4, against a town for the revision of a sewer assessment was referred to an auditor, who found in substance that the sewer system had been constructed by the town in and about two villages which were within the town, that one fourth of its entire cost had been set aside to be raised by general taxation and that in order to raise the remaining three fourths of the cost abutters upon the lines of the sewer, without regard to the location of their land, were assessed a uniform rate of one dollar per foot of frontage and in addition seven tenths of a cent per square foot of area for a uniform depth of one hundred feet; that the land of the petitioner was situated on a county road about one fifth of a mile from the nearest village and that there was no system of water supply in the vicinity. The auditor then reviewed the condition of the locality as to other buildings and the probable future development, and proceeded: "Giving . . . such weight as I am able to . . . evidence and con-

* The judge found that the plaintiff was the holder of the record title to the land in question subject to the tax sale and that the "record title to the premises, aside from the title by tax deed, in 1909 and until after the time limited for redemption, stood in the name of one Henry H. Lepper, of Worcester, who held it at the request of and for the benefit of the plaintiff in this action."

aiding all the circumstances . . . I find that by the construction of said sewers the land of the petitioner" was benefited to an amount equal to about half of the assessment. At the trial of the petition there was no evidence other than the auditor's report and the presiding judge ordered the jury to revise the assessment in accordance with the auditor's findings. *Held*, that the action of the presiding judge was correct, since upon the report the only conclusion possible as matter of law was that, while the principle adopted in making the assessment was correct, when it was applied to the petitioner's land it worked harshly and produced an assessment largely in excess of the benefit.

The rules by which the benefit conferred upon land by a public improvement is to be ascertained, when that question arises for settlement as a matter of fact, are the same as those by which land values are determined in any other connection, the inquiry being, how much has the particular public improvement added to the fair market value of the property, as between a willing seller and a willing buyer, with reference to all the uses to which it reasonably is adapted and for which it plainly is available, prospective as well as present, by strangers as well as by the owner.

On a petition filed under R. L. c. 49, § 4, it is not necessary, before a sewer assessment can be reduced, that it should appear that any matters considered by the public board who made the assessment were improper, nor that the system of assessment adopted was unsound as a general rule. It is possible that the plan of assessment may be just and commonly may produce equitable results, and yet may work so harshly as to the particular estate of the petitioner as to produce an assessment largely in excess of the benefit, so that the prayer of the petitioner should be granted.

TWO PETITIONS under R. L. c. 49, § 4, filed in the Superior Court on August 28, 1908, for a revision of sewer assessments levied upon land of the respective petitioners.

The petitions were referred to Charles H. Sibley, Esquire, as auditor. From his report, beside the facts stated in the opinion, the following facts appeared:

The respondent had adopted a system of sewerage and sewage disposal for that part of Northbridge known as Whitinsville and Linwood, and had established and constructed sewer drains and pipes in and through the village of Whitinsville and had extended a main sewer pipe from Whitinsville easterly for about nine thousand and forty-six feet, partly through town ways and partly through private land to a county road; that the main pipe thence was extended northerly in and along the county road for four hundred and ten feet and then, leaving the road, passed northeasterly through private land for about seventeen hundred and forty-three feet to the filter beds belonging to the defendant in which the sewage from Whitinsville is treated and filtered as a part of the system of sewage disposal.

The land described in the two petitions is situated about one fifth of a mile from the Whitinsville village, about one third of a mile from the northerly end of the thickly built portion of the village of Linwood, and about one half mile from Whitins Station on the Providence and Worcester Railroad, which is situated in the village of Linwood. The county road leads from Linwood northerly past the petitioners' premises toward Worcester. The distance between Linwood and the petitioners' premises for about one third of the way is thickly built and a few houses have also been erected in the remaining two thirds of that distance.

Upon the construction of the sewerage system the respondent set aside one fourth of the entire cost of the construction of the entire system to be raised by general taxation and, in order to raise and pay the remaining three fourths, adopted the method of assessing the owners of land along the lines of the sewers a fixed uniform rate of \$1 for each foot of land fronting on any street or way in which the sewers were constructed, and in addition thereto adopted a uniform rate of seven tenths of one cent for each square foot of land contained in an area extending back in depth one hundred feet from the street or way, and levied both the assessments upon all lands fronting on the respondent's sewer drains and pipes without regard to the location of the land. On that basis, the land of the petitioner in the first case was assessed \$578.90, and the land of the second petitioner \$697. These assessments the auditor found should be reduced to \$380 and \$350 respectively.

In the Superior Court the cases were tried before *Aiken*, C. J., and the auditor's report was the only evidence. The course of the trial is described in the opinion. The jury were ordered to find that the assessments should be revised in accordance with the findings of the auditor; and the respondent alleged exceptions.

The cases were submitted on briefs.

E. H. Vaughan, *E. T. Esty* & *J. Clark, Jr.*, for the respondent.

R. B. Dodge & *W. J. Taft*, for the petitioners.

RUGG, C. J. These are petitions under R. L. c. 49, § 4, for the revision of sewer assessments levied by the sewer commission of the respondent town for the benefit accruing from a sewer constructed under said c. 49. The case was referred to an audi-

tor, and in the Superior Court was tried upon his report as the only evidence. He found that the assessment was levied in accordance with the combined method of frontage and area pointed out in R. L. c. 49, § 5, and that the land of the petitioners was so situated that it could drain into the sewer, but found also that the assessment exceeded the actual benefit arising from the construction of the sewer. At the trial the respondent requested an instruction that the assessments should be confirmed and the petitions dismissed. This was refused, and the jury were instructed that the assessments should be revised and reduced in accordance with the findings of the auditor. The respondent's exception to this refusal to rule and to the ruling given brings the case here.

The assessments levied by the public board must stand as correct, unless shown by the landowner to be excessive. *Bigelow v. Boston*, 120 Mass. 326. But the auditor's report found that the assessment was excessive. This being the only evidence and made by law *prima facie* evidence of all facts reported, a verdict was properly directed, if upon that report only one conclusion was possible as matter of law. *Wakefield v. American Surety Co.* 209 Mass. 173, 176. The auditor made a somewhat full finding of facts, and the respondent contends that it appears on its face that incorrect rules of law were followed in reaching results, and that a different conclusion from that of the auditor was possible on the facts reported. *Fisher v. Doe*, 204 Mass. 34, 40.

As a rule, assessments based on the street frontage or on the area or on a combination of the two in accordance with legislative authority, and not in substantial excess of benefits conferred, have been upheld as not infringing the State or federal constitution. *Sears v. Aldermen of Boston*, 173 Mass. 71. *Corcoran v. Cambridge*, 199 Mass. 5. *Cheney v. Beverly*, 188 Mass. 81. *O'Connell v. First Parish in Malden*, 204 Mass. 118. *White v. Gove*, 183 Mass. 333. *Cleveland, Cincinnati, Chicago & St. Louis Railway v. Porter*, 210 U. S. 177. *French v. Barber Asphalt Paving Co.* 181 U. S. 324. *Martin v. District of Columbia*, 205 U. S. 185.

The principle of this assessment was correct. But a principle correct in the abstract may result in hardship in a particular

instance. The auditor found that the petitioners' land was located on a county road about one fifth of a mile from the nearest village, and that there was no system of water supply in that locality, and that during the past two years several houses had been built nearby, and "in case a sufficient demand for house lots in this neighborhood should arise . . . to make petitioners' land salable for building lots, and if the town water system should be extended to this territory the benefit derived would be fully equal to the assessment levied thereon." After reciting that the evidence as to the benefit received was contradictory, he proceeds: "Giving . . . such weight as I am able to . . . evidence and considering all the circumstances . . . I find that by the construction of said sewers the land of the petitioners" was benefited to an amount less than the assessment. A fair construction of this portion of the report is that the auditor has taken into account all factors as to future development, which affect present value, in determining the benefit accruing to the petitioners' lands from the construction of the sewer including "the potentiality of receiving a benefit" (*Wright v. Boston*, 9 Cush. 233, 236) when the water system should be extended and the public demand for house lots should increase, so far as these somewhat speculative considerations enter into present value.

The rules by which the amount of benefit conferred upon land by a public improvement is to be ascertained, when that question arises for settlement as a matter of fact, are the same as those by which land values are determined in any other connection. The inquiry is how much has the particular public improvement added to the fair market value of the property, as between a willing seller and a willing buyer, with reference to all the uses to which it is reasonably adapted and for which it is plainly available, prospective as well as present, by strangers as well as by the owner. Chances and probabilities of future use, if sufficiently near in time and definite in kind to be of practical importance, enter into present market value, and so far as they enhance or diminish it are to be given full weight. But where they are so remote as to rest chiefly in the imagination, and do not in fact influence the price which customers would be willing to pay in a present sale, they cannot be the basis of a determina-

tion of benefit or value. *Reals v. Brookline*, 174 Mass. 1. See *Smith v. Commonwealth*, *post*, 259, and cases there cited.

The report as a whole indicates that the auditor adopted these principles, although he went further than required in stating the speculative benefits, and that he followed the interpretation of R. L. c. 49, § 5, as to special benefits, which was announced in *Cheney v. Beverly*, 188 Mass. 81. It was not necessary that before reducing the assessment he should be satisfied that any matters considered by the sewer commission in making the assessment were improper. It was enough to justify his finding if the assessment exceeded the benefit. Nor was he obliged to find the system of assessment unsound as a general rule. It is possible that the plan of assessment may be just and commonly produce equitable results, and yet work so harshly as to a particular estate by reason of its remote location or otherwise, as to produce an assessment largely in excess of the benefit.

R. L. c. 49, § 9, which authorizes an extension of time for the payment of an assessment upon unoccupied land, has no application to an instance where the assessment is in substantial excess of the benefit.

Exceptions overruled.

FRANCIS X. LAFLAMME vs. MARY H. LAFLAMME.

Worcester. October 3, 1911. — October 17, 1911.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DECOURCY, JJ.

Marriage and Divorce, Desertion, Condonation.

At the hearing of a libel for divorce filed by a husband in February, 1911, and alleging as ground for divorce utter desertion continued for three consecutive years next previous to the date of the filing of the libel, it appeared that in March, 1906, the parties were living together in Canada, when the libellee deserted her husband and took up her abode in Milford in this Commonwealth; that in December, 1909, for the purpose of inducing the libellee to return to him, the libellant visited her in Milford and remained three or four days, during which period they cohabited as man and wife, occupying the same room and bed, the libellee, however, not promising or giving the libellant reason to believe that she would return to his home; that immediately thereafter the libellant returned to his home in Canada, whither the libellee refused to accompany him. Held, that the cohabitation as man and wife in 1909 was a complete renewal in all respects of the marriage relation between them and was an absolute removal of the cause of divorce then existing,

and could not be said to be merely a condonation or conditional forgiveness of her previous misconduct so that upon her subsequent refusal to accompany the libellant to his home the effect of the cohabitation was avoided; and therefore that the libel should be dismissed, since there was not on the part of the libellee any "utter desertion continued for three consecutive years next prior to the filing of the libel," as required by R. L. c. 152, § 1.

LIBEL for divorce, filed on February 27, 1911, alleging as ground for divorce utter desertion for three consecutive years next previous to the date of the libel.

In the Superior Court the case was heard by *McLaughlin, J.*, who found that at some time after their marriage the libellant and the libellee had lived together in this Commonwealth; that in March, 1906, they had a home in Canada from which at that time the libellee withdrew herself and took up her abode in Milford and thus became guilty of an utter desertion of the libellant within the meaning of R. L. c. 152, § 1. In December, 1909, the libellant for the purpose of inducing the libellee to return to his home in Canada visited the libellee at the house in which she was living in Milford and remained with her there for about four days, during which period they cohabited together as man and wife, occupying the same room and bed. The libellee did not then promise or give her husband cause to believe that she would return to his home. Immediately after this visit, the libellant returned to his home in Canada. The libellee did not accompany him and did not follow him to his home, but continued to live in Milford, although he subsequently wrote to her asking her to return.

The trial judge ruled as a matter of law that the libellant could not maintain his libel, and reported the case for determination by this court. If the ruling of the judge was wrong, a decree of divorce for desertion was to issue; otherwise, the libel was to be dismissed.

The case was submitted on a brief.

W. Williams & S. D. Vincent, for the libellant.

No counsel appeared for the libellee.

SHELDON, J. We must take it that no difficulty arose in this case under the provisions of R. L. c. 152, §§ 4, 6. The only question is whether upon the findings of the judge it ought to have been ruled as matter of law that the libel cannot be maintained. We are of opinion that this ruling properly was made.

It is true, as was argued in behalf of the libellant, that in December, 1909, he had become entitled to a divorce from his wife on the ground of her desertion. *Cargill v. Cargill*, 1 Sw. & Tr. 235. He did not however attempt to avail himself of this right, but visited her at the house in which she was living, at Milford in this Commonwealth, and remained there with her for about four days. During this period, it is found that "they cohabited together as man and wife." This was a complete renewal in all respects of the marriage relation between them. It was not simply that they occupied the same room and bed, although this also was found. Accordingly we need not consider whether the latter fact alone, unexplained, would not import as a necessary inference the complete cohabitation as man and wife which has been found. The wife's desertion ceased and he again received her as his wife when they thus resumed the matrimonial relations that had been interrupted in 1906 by her desertion. If afterwards, no matter how soon, she deserted him anew, this was merely a new act of misconduct on her part. But it is not barely "utter desertion continued for three consecutive years" that is a ground for divorce under our statute; the three consecutive years must have been "next prior to the filing of the libel." R. L. c. 152, § 1. Here, the parties lived together as husband and wife in December of 1909, though only for four days; and so there was no desertion for the "three consecutive years next prior to the filing of the libel." For this reason, no cause of divorce was shown at the hearing, and the ruling made was correct. *Gaillard v. Gaillard*, 28 Miss. 152.

It cannot be said that the husband's conduct in resuming matrimonial relations with his wife was merely a condonation or conditional forgiveness of her previous misconduct; and that her subsequent refusal to accompany or follow him to his home in Canada was the beginning of a new desertion by her (*Franklin v. Franklin*, 190 Mass. 849), which avoided the effect of his condonation and so entitled him to rest his libel upon her first desertion. If we assume that this reasoning would otherwise be correct, yet we have not here a case of mere condonation, although it doubtless included that element. It was voluntary action on the part of the libellant, which by putting an end to the earlier desertion made it impossible to say that any desertion

had continued for the statutory period up to the filing of this libel. It was an absolute removal of the existing cause of divorce, and the fact that it involved also a forgiveness of the past wrong that had been done cannot diminish its full effect.

The cases of *Danforth v. Danforth*, 88 Maine, 120, and *Kennedy v. Kennedy*, 87 Ill. 250, turned on the fact that in them no complete renewal of matrimonial cohabitation was found. It is not necessary to consider whether, under the same facts, we should be inclined to follow those decisions. See *Woolfolk v. Woolfolk*, 96 Ky. 657; *Burk v. Burk*, 21 W. Va. 445; *Reed v. Reed*, 62 Ark. 611; *Holmes v. Holmes*, 44 Mich. 555.

Under the terms of the report, the libel must be dismissed.

So ordered.

ROSCOE H. HULL vs. BOSTON AND MAINE RAILROAD.

Worcester. October 3, 1911. — October 17, 1911.

210 - '55-8
221 - '184

Present: RUGG, C. J., HAMMOND, BRALEY, & SHELDON, JJ.

Railroad, Enforcement of reasonable rule as to dogs in passenger cars. *Trespass*, *Ab initio*. *Assault and Battery*. *False Imprisonment*. *Dog*.

While it is reasonable for a railroad company to make a rule excluding dogs from its passenger cars and to insist that a passenger, who is upon such a car with a dog, either shall comply with the rule or leave the train, a conductor who is a special police officer is not justified in placing a passenger refusing to comply with such a rule under arrest so long as the passenger is not guilty of disorderly or noisy conduct or of a refusal to pay his fare; and, if without a warrant the conductor attempts to make such an arrest and the passenger is removed from the train by him and other agents of the company without the use of excessive force and is conducted by the other agents of the company through the streets of a town and delivered to a police officer who refuses further to hold him under arrest, the company is liable to the passenger for the duress and indignity to which he was subjected, not only while he was on the train but afterward, and for all the force used upon his person in removing him from the car and until he was released from custody.

TORT for alleged assault and battery upon and false imprisonment of the plaintiff while he was a passenger of the defendant. Writ dated September 24, 1909.

The answer of the defendant, as amended, contained a general denial and allegations that, "if the plaintiff shall prove that he was ejected" or "detained," "then the defendant answers that he was rightly ejected" or "detained and with the use of no more force than was necessary."

In the Superior Court the case was tried before *Aiken*, C. J.

The plaintiff's evidence tended to show that he became a passenger upon one of the defendant's trains at Worcester to travel to Charleston, New Hampshire, to which point he had a valid ticket which he presented to the conductor who "punched it through to Winchendon;" that the plaintiff had with him a small dog; that when the conductor took the tickets he told the plaintiff that he would have to take the dog into the baggage car because it was the rule of the railroad; that the plaintiff declined to do so; that before reaching Gardner the conductor again came to the plaintiff, showed him a copy of the rule as to dogs printed on a time-table, and asked him if he would take his dog into the baggage car; that the plaintiff replied that he would not. The rule, which was printed on the time-table that the conductor showed the plaintiff, was as follows: "Special information for passengers. Dogs will not be permitted in passenger coaches, but will be checked and transported in baggage cars, at owner's risk, upon payment of a minimum charge equal to 100 pounds of excess baggage for each animal."

The plaintiff's evidence further tended to show that at Gardner the conductor again came to the plaintiff and said: "There is fifteen cents fare due on that dog. You are evading fare. The next station is Heywoods and you will have to get off;" that the plaintiff thereupon put his hand in his pocket and said, "If there is fifteen cents due on the dog, I will pay it," and that the conductor replied, "I shan't take it. You will have to get off;" that upon arriving at the next station the conductor returned with the brakeman and the ticket agent and said, "Are you going to get off;" that the plaintiff replied, "No, my ticket takes me through to Winchendon," and that the conductor replied, "It don't make any difference. You will have to get off;" that the plaintiff then asked the conductor why he would have to get off and he replied, "You are evading fare;" that the plaintiff then said, "I offered to pay the fare of the dog such as

due," but the conductor said, "It doesn't make any difference. You will have to get off, and if you don't get off, I shall arrest you;" that the conductor was a railroad police officer;* that the plaintiff asked him what he would arrest him for, and the conductor said, "For evading fare," and thereupon put his hand upon the plaintiff's shoulder and said, "Under arrest;" that the plaintiff's wife then picked up the dog and said that she would take him into the baggage car rather than have so much trouble; that the conductor replied, "It is too late. He is under arrest and has to get off;" that he then motioned to the brakeman and the station agent and all three took hold of the plaintiff and pulled him down the aisle and out of the train, and that then the ticket agent took the plaintiff by the arm, led him down a public street to a square and there, in the presence of a crowd of people, demanded that the chief of police arrest the plaintiff and lock him up; that the chief of police asked why the plaintiff should be locked up and the station agent replied, "For evading fare;" that the plaintiff then showed the chief his tickets and explained the situation, and the chief declined to receive the plaintiff as a prisoner until the station agent should procure a warrant for his arrest; that the station agent then mingled with the people and went away, leaving the plaintiff.

At the close of the evidence, the plaintiff asked the presiding judge to give to the jury, among other instructions, an instruction that the defendant had shown no justification for the assault of its officers and agents upon the plaintiff, and that they must find for the plaintiff. The judge refused the request, and among other instructions charged the jury in substance, that while the defendant's rule as to dogs was a reasonable one which it had a right to enforce, the situation presented by the evidence did not come within that class of offenses, refusal to pay fare or noisy or disorderly conduct, that would have given the conductor a right to arrest the plaintiff; that, upon the plaintiff's refusal to have the dog in the baggage car, the defendant had a right to put him off the train at the next stopping place, using no more force in kind or degree than was reasonably necessary to effect the removal. "It does not make any particular difference what name was given

* See R. L. c. 108, §§ 18-20.

to the right by the railroad officer who took the man from the car. If the doctor [the plaintiff] refused to have his dog transported in the baggage car, then there was the right of removal. And if there was no more force used in effecting the removal of the doctor from the car than was reasonably necessary, then, gentlemen, up to that point in the case, there is no responsibility for damages. . . . Now, when Dr. Hull was upon the station platform then the rights of the railroad by way of removal were ended . . . anything further in the way of conducting the doctor through the street or streets of Gardner or any public part of Gardner for the purpose of taking him to court or to find a police officer was in excess or was unauthorized by the law in this case. And if you find that in leading or conducting the doctor through the streets of Gardner he sustained damage, then there is a right to damages in that aspect of the case. Now, you have the right if you reach this aspect of the case to take into consideration any feeling of indignity or chagrin that a man would naturally, ordinarily and reasonably feel by reason of such conduct as appears in this case."

The jury, in answer to special questions propounded to them by the presiding judge, found that in removing the plaintiff from the car no more force was used than was reasonably necessary, and that the plaintiff while in the car did not conduct himself in a noisy or disorderly manner.

The jury found for the plaintiff in the sum of \$30; and the plaintiff alleged exceptions to the refusal to give the instruction asked for by him and to the instruction given that it did not make any particular difference what name was given by the conductor to the right to remove the plaintiff from the car.

H. W. Blake, for the plaintiff.

C. M. Thayer, (*A. H. Bullock* with him,) for the defendant.

BRALEY, J. The plaintiff, having been accepted as a passenger, was lawfully in the car, and the defendant had undertaken to provide reasonable facilities for his transportation in safety and to protect him from violence, annoyance and discomfort whether arising from disorderly conduct of fellow passengers, or the wrongful interference of its employees, or the intrusion of strangers whose presence by the exercise of due care could have been anticipated and prevented. *Jackson v. Old Colony Street*

Railway, 206 Mass. 477, 485, 486. *Exton v. Central Railroad*, 33 Vroom, 7; 34 Vroom, 356. *New Jersey Steamboat Co. v. Brockett*, 121 U. S. 637. In the performance of this duty the railroad had the right to establish and enforce reasonable regulations for its own protection in the management of its business. St. 1906, c. 463, Part II, § 181. *Commonwealth v. Power*, 7 Met. 596. *O'Neill v. Lynn & Boston Railroad*, 155 Mass. 371. *Cutts v. Boston Elevated Railway*, 202 Mass. 450, 455.

It is common knowledge that for various reasons, which may be either fanciful or well founded, the presence of dogs even when accompanied by their owners or custodians often causes passengers serious discomfort and annoyance, or apprehension of bodily danger; and their exclusion from its passenger coaches while permitting them to be carried for hire in the baggage cars is not an unreasonable exercise of this authority. *Commonwealth v. Power*, 7 Met. 596, 601. *Honeyman v. Oregon & California Railroad*, 13 Ore. 352. *Gregory v. Chicago & Northwestern Railway*, 100 Iowa, 345. The plaintiff having been informed of the regulation was bound by it, and when requested by the conductor to remove the dog in his possession and control to the baggage car and to make the necessary payment, his refusal would have warranted his expulsion by the use of sufficient but not excessive force if, when the train stopped at the next station, he had refused to depart. *Commonwealth v. Jones*, 174 Mass. 401. *Johnson v. Concord Railroad*, 46 N. H. 213. *Whitesell v. Crane*, 8 W. & S. 369. *Trotlinger v. East Tennessee, Virginia & Georgia Railroad*, 79 Tenn. 538. *Jackson v. Old Colony Street Railway*, 206 Mass. 477.

But upon the uncontradicted evidence the conductor, who also was a railroad police officer, after a somewhat prolonged colloquy with the plaintiff, instead of taking proper measures to enforce the regulation exhibited his badge of office and informed him that he was placed under arrest "for evading fare." By the common law this restraint was illegal; and under R. L. c. 108, § 18, authority to arrest without a warrant is conferred only where the passenger refuses to pay his fare or is noisy or disorderly. The plaintiff, however, in refusing to obey the regulation was not guilty of an evasion of his fare, and throughout the controversy he was not charged with unseemly behavior. No justification

having been shown for the duress and indignity to which he was subjected not only while on the train but at the station, or for the force used upon his person in removing him from the car and until he was released from custody, the defendant is responsible in damages, whether the conductor acted as its servant or as a special police officer. It also is answerable for the conduct of its brakeman and station agent who rendered assistance and participated in the assault and false imprisonment. *Brock v. Stimson*, 108 Mass. 520, 521. *Jackson v. Old Colony Street Railway*, 206 Mass. 477. *Horgan v. Boston Elevated Railway*, 208 Mass. 287. R. L. c. 108, § 20.

It is therefore clear that the plaintiff's second request, that the defendant had shown no justification for the assault, was in accordance with the evidence; and the instructions to which he excepted, that the defendant would be liable only for the use of excessive force in the plaintiff's ejection and for the wrongful restraint of his liberty after he reached the station platform, were insufficient.

Exceptions sustained.

CHARLES S. SAVAGEAU vs. BOSTON AND MAINE RAILROAD.

Worcester. October 3, 1911. — October 17, 1911.

217-604
219-390 Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DECOURCY, JJ.

Negligence, Railroad. Railroad, Maintenance of stations. Practice, Civil, Conduct of trial: judge's charge.

The declaration in an action against a railroad company by one, who was injured by being run into by a train of the defendant while he was waiting on a station platform to take the train, alleged as the cause of the injury a negligent and improper management of the locomotive engine. At the trial there was evidence that there were seventy-five or one hundred persons on the platform, which would accommodate three hundred and fifty persons, that the platform was of cinders and ran to the nearest rail of the railroad track and on a level with it, that the train "came in fast," and that the plaintiff, who was walking down the platform near the track, jumped back from it and was pushed again toward it by a crowd coming from the station, and was run into by the train. The presiding judge ordered a verdict for the defendant. *Held*, that the

action of the judge was proper, since there was no evidence of negligent operation of the train.

While a railroad company is bound to provide at a station a platform suitable in area and construction and sufficiently lighted for the accommodation and safety of passengers while waiting for trains upon which they intend to take passage, the care and diligence to be exercised by the company in performing that duty is of a degree commensurate with the nature of the carrier's undertaking; and therefore a request for an instruction to a jury, before whom was being tried an action for personal injuries alleged to have been caused by the maintenance of an insufficient and improper platform, which purports to state the carrier's duty but omits to define the degree of care and diligence required as being commensurate with the nature of the carrier's undertaking, should be refused.

The mere fact that a platform of a railroad station is built level with the nearest rail of the railroad track and up to it, so that an ordinary passenger car or locomotive engine would project over the platform between two and three feet, while an important, is not a conclusive, factor in determining whether the maintenance of such a platform was a failure on the part of the railroad company to perform its duty to maintain a platform suitable for the accommodation and safety of its passengers.

At the trial of an action by a passenger against a railroad company for personal injuries received while the plaintiff was waiting on a station platform in the evening for a train, and due to his being run into by the train, there was evidence that the plaintiff, observing that he was in danger because of his nearness to the track, sought to jump back from the track and out of the way and was pushed back toward the track by a crowd, and the plaintiff asked the judge to instruct the jury that "If you find that the plaintiff, as soon as he saw that he was in danger from the approaching train, used reasonable efforts to get out of the way, you will find that he was in the exercise of due care." The judge refused so to instruct the jury, but did instruct them, "If you should be satisfied that the account he [the plaintiff] gives you, and his witnesses give you, is exactly correct, it by no means follows that he is in the exercise of due care. It is for you to say, assuming that you believe that he has given you an account that is exactly correct or substantially correct. It by no means follows that he is entitled to say that he was in the exercise of due care." Upon the plaintiff objecting to the language used, the judge made statements to the jury from which, as well as from his whole charge, it was apparent that the jury were correctly instructed that the standard of care required of the plaintiff was that of a reasonably careful and prudent man when called upon to act under similar conditions, and, the question being one for their decision, that they could review his entire conduct from the time he passed to the platform and until he was injured, and that they were not restricted to the field of inquiry as defined in the plaintiff's request for an instruction above quoted. *Held*, that the action of the judge was proper and that the plaintiff had no ground for exception.

At the trial of an action of tort against a railroad corporation for personal injuries, the plaintiff excepted "to the repetition of the facts of the defendant's contention, under the charge of due care, and also the charge of negligence." It was not questioned but that the propositions of law stated by the judge were correct. *Held*, that the exception must be overruled, since it was for the judge to determine whether the nature of the case and the administration of justice called for a repetition of legal principles which already had been stated, and his decision as well as the language employed to express his definitions, even if emphasized, were not reviewable if the propositions of law involved were correctly given.

TORT for personal injuries due to the plaintiff being run into by a train of the defendant while, having purchased a ticket, he was waiting at Heywoods Station for the train. The declaration contained two counts, the first alleging as the cause of the plaintiff's injury a negligent failure of the defendant to adopt, erect and maintain a suitable, proper and safe station, approaches and waiting places for passengers while lawfully upon the defendant's premises at Heywoods Station, and the second count alleged as the cause of the injury a negligent, improper and careless management of one of the defendant's engines. Writ dated February 10, 1909.

In the Superior Court the case was tried before *Lawton, J.*

The plaintiff's evidence tended to show that he was waiting at the station to take a train due to leave at 7.38 P. M. It appeared that the only platform for passengers at the station was a hard cinder walk nearly level, extending from the line of the station to the top of the nearest rail of the nearest track, which was the track upon which all trains arrived and departed from the station; that the surface of the walk was even with the top of the rail and about two tenths of a foot higher at the line of the station than at the top of the rail; that there was no difference between the appearance of the walk at any place between the line of the station and the nearest rail, and no curbing or any other device to indicate to a passenger the extent to which incoming trains would overhang the walk; that the steam chest of the standard engine used by the defendant would overhang the walk from two and one tenth to two and seven tenths feet. This walk extended from a point south of the station near the gateman's house along in front of the station to a point one hundred and seventy feet north of it. The station itself was thirty-four feet long on the side facing the track. A flight of four wooden steps, five feet wide, led up to it from the walk. The width of the walk to the nearest rail of the nearest track was ten feet at the gateman's house and twelve feet north of the station. In front of the station, the width of the walk was thirteen feet, except in front of the flight of steps, where it was seven and eight tenths feet. Three hundred and fifty persons could stand upon the platform comfortably and without being crowded.

There was evidence that on the evening in question there were

from seventy-five to one hundred people on the platform when the train came in, that it "came in fast;" that the plaintiff was walking up the platform as the train came in, and that, when he was about opposite the station steps, he was near the track and "tried to jump out of the way" and "got crowded back again in the same place" and was struck by the train.

At the close of the evidence the presiding judge ordered a verdict for the defendant on the second count.

As to the first count the plaintiff asked that the jury be instructed as follows:

"4. Carriers of passengers for hire are bound to use the utmost care and diligence in the providing of suitable and proper carriages, engines, track and appliances, in order to prevent those injuries to passengers which human care and foresight can guard against."

"8. If you find that the plaintiff's injury resulted from the failure of the defendant to construct and maintain a reasonably safe, commodious and sufficient platform, and that the plaintiff was at the time in the exercise of due care for his own safety, the defendant is liable."

"10. If you find the defendant maintained no platform, and that the plaintiff while in the exercise of due care for his own safety was injured as a result of the defendant's failure to maintain a platform, the defendant is liable.

"11. If you find the defendant had so constructed the platform in question that an ordinary engine and car would extend over it for an unreasonable distance, and that there was nothing in the usual and ordinary course of business at said station to render such construction necessary, and the plaintiff, while in the exercise of due care, was injured by such construction, the defendant is liable.

"12. The construction of a platform or substitute therefor at a busy station where trains commonly come in upon only one track, so that it goes completely to the rail of the railroad with nothing to indicate to passengers the line of safety from an incoming engine or train, is negligence of itself, and if it resulted in injury to a passenger who was in the exercise of due care, the defendant is liable."

"14. If you find that the plaintiff, as soon as he saw that he

was in danger from the approaching train, used reasonable efforts to get out of the way, you will find that he was in the exercise of due care."

The judge refused to give any of these instructions. Exceptions by the plaintiff to the judge's charge are described in the opinion.

The jury found for the defendant; and the plaintiff alleged exceptions.

Other facts are stated in the opinion.

H. W. Blake, for the plaintiff.

C. M. Thayer, (*A. H. Bullock* with him,) for the defendant.

BRALEY, J. The only evidence as to the second count was a statement of a witness for the plaintiff, that the train came in fast, but, nothing more being shown, no inference could be drawn that the engineer was negligently running at such an excessive or unusual speed as to endanger the plaintiff, who among other passengers was waiting on the station platform for its arrival. *Gerry v. New York, New Haven, & Hartford Railroad*, 194 Mass. 35, 37.

But if the ruling, that the plaintiff had failed to prove any liability of the defendant under this count, was right, he complains that under the first count, upon which the case went to the jury, his requests for rulings should have been given, and that the instructions to which he excepted were inaccurate and misleading.

It is undoubtedly true, that the defendant was bound to provide a suitable platform in area and construction, and sufficiently lighted for the accommodation and safety of passengers while waiting for trains upon which they intended to take passage. *Young v. New York, New Haven, & Hartford Railroad*, 171 Mass. 33. In the performance of this duty, as often pointed out, the degree of care and diligence to be exercised must be commensurate with the nature of the carrier's undertaking. The plaintiff's fourth request having omitted this qualification was inappropriate, and the rule was correctly stated in the charge. *Marshall v. Boston & Worcester Street Railway*, 195 Mass. 284, 286, 287. *Gardner v. Boston Elevated Railway*, 204 Mass. 213, 216, 217.

It also was a question for the jury whether the platform as

constructed was reasonably safe for the use of passengers. The fact that it was built level with the track so that an ordinary passenger car with the engine would project over the platform for a distance equal to the space between the inner rail and outer side of the car, while important, was not conclusive. It was for the jury to determine in view of the amount and frequency of travel, if the projection of the engine and cars was unusual, unnecessary and unreasonable. The eighth, tenth, eleventh and twelfth requests accordingly could not properly have been given in the language in which they were presented, but the questions raised were fully and accurately stated in unexceptionable instructions.

It is doubtful under the colloquy between the counsel for the plaintiff and the presiding judge before the jury retired, if exceptions to the instructions as to the degree of care required of the plaintiff are open. If treated as before us, the plaintiff excepted to the instruction, "If you should be satisfied that the account he gives you, and his witnesses give you, is exactly correct, it by no means follows, that he is in the exercise of due care. It is for you to say, assuming that you believe that he has given you an account that is exactly correct or substantially correct. It by no means follows that he is entitled to say that he was in the exercise of due care." The instruction, however, is to be read with the context, and what was said to the jury after counsel had stated that he excepted. It then is manifest that the jury were correctly instructed, that the standard of care required of the plaintiff was that of the reasonably careful and prudent man when called upon to act under similar conditions, and, the question having been one for their decision, they could review his entire conduct from the time he passed to the platform and until injured, and were not restricted to the field of inquiry as defined in the fourteenth request. *Hennessey v. Taylor*, 189 Mass. 588, 585.

The plaintiff further excepted "to the repetition of the facts of the defendant's contention, under the charge of due care, and also the charge on negligence." It is urged that the course pursued was objectionable and prejudiced him with the jury. But it is for the judge to determine if the nature of the case and the administration of justice calls for a repetition of legal principles

which already have been stated, and his decision as well as the language employed to express his definitions, even if emphasized, are unreviewable if the propositions of law involved are correctly given. *Howes v. Grush*, 181 Mass. 207, 211. *Whitney v. Wellesley & Boston Street Railway*, 197 Mass. 495, 502.

Exceptions overruled.

STEPHEN KHINOVECK vs. BOSTON AND MAINE RAILROAD.

Worcester. October 8, 1911. — October 17, 1911.

Present: RUGG, C. J., HAMMOND, BRALEY, & SHELDON, JJ.

Negligence, Railroad. Railroad, Duty to maintain fence. Fence.

At the trial of an action by a child three years and four months of age against a railroad corporation to recover for injuries caused by being run into by a train of the defendant in its freight yard, it appeared that parallel with the track upon which the train was and five feet and seven inches from it was a ten foot passageway which the public had a right to use, that the track was four feet lower than the passageway, that the child when struck by the train was on the defendant's track, and that there was no fence or barrier separating the track from the passageway. *Held*, that the plaintiff was not entitled to have the case submitted to the jury, since it appeared that when he was injured he was a trespasser upon the defendant's track and there was no evidence tending to show that the defendant or any of its servants or agents had been guilty of wanton or reckless misconduct toward him.

At the trial of an action by a child three years and four months of age against a railroad corporation to recover for injuries caused by being run into by a train of the defendant in its freight yard, it appeared that parallel with the track upon which the train was and five feet and seven inches from it was a ten foot passageway extending for four hundred and sixty feet along the track, fronting on which were a number of tenement houses in one of which the plaintiff's parents were tenants; that the land occupied by the tenement houses, the passageway and the defendant's land had been owned formerly by one who, in a deed of a part of the land to a predecessor of the defendant, had reserved to himself and his heirs and assigns the use of the passageway; that the passageway was four feet higher than the railroad track, and that the plaintiff when injured was upon the track; and there was evidence that he had fallen under one of the car wheels. The plaintiff contended that the cause of the accident was a negligent failure of the defendant to erect a barrier or fence between the track and the passageway. *Held*, that the plaintiff was not entitled to have the case submitted to the jury, because the defendant was under no obligation, either at common law or by statute, to erect or maintain a fence or barrier between its freight yard and the passageway; following *Menut v. Boston & Maine Railroad*, 207 Mass. 12.

TORT by a child three years and four months of age for injuries caused by being run over by a train of the defendant which was proceeding along a siding in Worcester. The declaration was in two counts, the first count alleging that the injury was caused by a train of the defendant running over the plaintiff and was due to "negligence, carelessness and want of precaution" on the part of the defendant's agents and servants, and the second count alleging as the cause of the injury neglect of the defendant "to safeguard its track and premises." Writ dated November 5, 1908.

In the Superior Court the case was tried before *King, J.*

It appeared that when the plaintiff was run over he was on the westerly rail of a track of the defendant in its freight yard; that five feet and seven inches west of that rail and extending parallel with it for four hundred and sixty feet was a ten foot strip which was rightfully used as a passageway by the public and which was four feet higher than the defendant's track, so that a gully was formed between it and the track. For many years there had been no guard or fence between the passageway and the railroad track.

Fronting on the passageway were a number of tenements and the plaintiff was the child of one of the tenants therein. The land occupied by the tenements and the passageway and the defendant's property formerly had belonged to one who had conveyed to the defendant's predecessor in title the property which it was occupying by a deed "reserving" to himself and his heirs and assigns "the use and occupation, for all purposes except building and other obstructions to the injury of said railroad, on the strip of land" which was the passageway above described.

An officer of the defendant, in answer to an interrogatory, "If you have actual knowledge of how the accident happened, state it," stated, "I am informed that the child fell under one of the car wheels."

At the close of the plaintiff's evidence, the presiding judge ordered a verdict for the defendant; and the plaintiff alleged exceptions.

P. T. Dolan, for the plaintiff.

C. M. Thayer, (*A. H. Bullock* with him,) for the defendant.

HAMMOND, J. While the plaintiff, an infant between three and four years of age, had the right to travel upon the strip of land adjoining the defendant's freight yard, there is no evidence that either in the exercise of a public or private right of way or of any other right was he lawfully upon the defendant's tracks. Nor is there any evidence that the gully by the side of the strip had anything to do with the accident. Upon the evidence the plaintiff must be regarded as a trespasser at the place of the accident and therefore the defendant was not bound to anticipate his presence, and it owed him no duty except to refrain from wanton and wilful misconduct toward him. *June v. Boston & Albany Railroad*, 158 Mass. 79. *Myers v. Boston & Maine Railroad*, 209 Mass. 55. *O'Brien v. Union Freight Railroad*, 209 Mass. 449, and cases cited. The evidence shows no such misconduct on the part of the defendant or its servants. The plaintiff failed upon his first count.

Nor was there any case on the second count. Upon the evidence as between the plaintiff and the defendant the latter was not under any obligation either at common law or by statute to erect or maintain a fence between its freight yard and the adjoining strip of land. *Menut v. Boston & Maine Railroad*, 207 Mass. 12, and cases cited.

Exceptions overruled.

CHARLES F. ADAMS vs. PROTECTIVE UNION COMPANY.

Worcester. October 8, 1911. — October 17, 1911.

Present: HAMMOND, BRALEY, SHELDON, & DECOURCY, JJ.

Corporation, By-laws, Rights of stockholders, Duties of directors. Equity Jurisdiction, To enjoin unfair treatment of stockholder by corporation. Equity Pleading and Practice, Report, Findings by trial judge.

The members of a voluntary association carrying on a wholesale and retail grocery business in Worcester formed themselves into a corporation and adopted as one of their by-laws the following: "In case of the death or removal from the city, of any stockholder, the directors may purchase the share of such stockholder paying therefor the full value as shown by the figures of the last annual report. If said share is not duly assigned to the corporation upon demand made therefor by the directors, it shall not be entitled thereafter to more than one regular dividend." Eight years after the incorporation the by-law, against the vigorous opposition of one of the shareholders, who, four years after the incorporation,

had removed from Worcester, was amended to read as follows: "In case of the death or removal from the city of any stockholder, the directors may purchase the share of such stockholder. If said share is not duly assigned to the corporation upon demand made therefor by the directors, it shall not be entitled thereafter to more than one regular dividend. For a share duly surrendered after it ceases to be entitled to a dividend under this article, there shall be paid the sum last fixed by the directors as the value of a share of stock. The value of a share of stock as fixed by the directors after the last annual inventory shall remain at that price until the next annual inventory has been taken, unless the corporation shall in the meantime have sustained a serious loss in which case the directors may fix a new price for shares for the balance of that year." In a suit in equity by the non-resident shareholder to have declared invalid proceedings of the directors under the amended by-law asserted by them to have terminated his rights as a stockholder, this court assumed without deciding that the by-law as amended might be found to bind the plaintiff as a contract between him and the corporation, and decided the case on other grounds.

The members of a voluntary association engaged in the wholesale and retail grocery business in Worcester formed themselves into a corporation and adopted a by-law providing that in case of removal of a shareholder from the city the directors might purchase his share paying therefor its full value as shown by the corporation's last annual report, and that, if the share was not assigned to the corporation upon demand by the directors, the shareholder should not be entitled thereafter to more than one regular dividend. Eight years after the incorporation the by-law was amended to make more explicit the method of procedure in case of removal of a shareholder from Worcester and action under it at once was taken by the directors as to a certain shareholder, dividends on his stock were discontinued and his rights as shareholder no longer were recognized. He brought a suit in equity to compel the corporation and the directors to recognize his rights as a shareholder and to recover the dividends which he had not received, and the judge who heard the case found, on evidence warranting the findings, that the plaintiff for four years with the knowledge of the directors and shareholders had resided outside of Worcester, and that a number of other shareholders had done so without any action being taken to terminate their rights as shareholders, that the stock had for several years paid dividends of over one hundred per cent, that in seeking to enforce the by-law against the plaintiff the directors had acted arbitrarily, capriciously and oppressively, being influenced thereto because of personal hostility to the plaintiff and from resentment at his opposition to their wishes at meetings of the shareholders, and that they were discriminating against him unreasonably and acting oppressively with the settled purpose of compelling him to surrender his stock at a great sacrifice to its value or to forfeit the dividends therein. *Held*, that the plaintiff was entitled to the relief which he sought, since it was apparent that the conduct of the directors was lacking in the good faith which the fiduciary nature of their powers required.

The findings of fact contained in a report to this court by a judge of the Superior Court who has heard a suit in equity which was tried largely on oral testimony, although some of them may appear extreme, will not be disturbed unless it appears from the report that they clearly were wrong.

DECOURCY, J. Before 1899 the plaintiff and the other incorporators of the defendant carried on a wholesale and retail

grocery business in Worcester as a voluntary association. In January, 1899, they organized this corporation, and voted to sell to it all the assets of the association and to accept in payment one share of stock in the corporation for each member of the association. The plaintiff was present at this meeting and at the earlier meeting of the incorporators when the by-laws were adopted.

At a special meeting of the stockholders held on April 5, 1907, one of the original by-laws* was amended so as to read as follows:

“Article XIII (formerly Article 14).

“In case of the death or removal from the city of any stockholder, the directors may purchase the share of such stockholder. If said share is not duly assigned to the corporation upon demand made therefor by the directors, it shall not be entitled thereafter to more than one regular dividend. For a share duly surrendered after it ceases to be entitled to a dividend under this article, there shall be paid the sum last fixed by the directors as the value of a share of stock. The value of a share of stock as fixed by the directors after the last annual inventory shall remain at that price until the next annual inventory has been taken, unless the corporation shall in the meantime have sustained a serious loss in which case the directors may fix a new price for shares for the balance of that year.”

The plaintiff was a resident of Worcester until 1908. From 1904 to 1909 he lived in the town of Spencer to the knowledge of the defendant's officers, but continued to trade with the defendant and to receive notices of stockholders' meetings. At the commencement of this action he lived and voted in Worcester.

At the stockholders' meeting of April 5, 1907, the plaintiff opposed the continuance of said by-law, as he had at earlier meetings. On April 18, 1907, the following notice was sent to him by the clerk: “At the regular monthly meeting of the directors of the Protective Union Company held April 12th, the

* The by-law originally read as follows: “In case of the death or removal from the city, of any stockholder, the directors may purchase the share of such stockholder, paying therefor the full value as shown by the figures of the last annual report. If said share is not duly assigned to the corporation upon demand made therefor by the directors, it shall not be entitled thereafter to more than one regular dividend.”

clerk was directed to notify you, that, you having removed from Worcester, they hereby demand the surrender of your share of stock in the Protective Union Company. For which they stand ready to pay the full value if duly surrendered under the by-laws."

This demand was refused. Since that time the plaintiff has received but one dividend, in September, 1907, although the defendant declared and paid to every other stockholder dividends amounting to one hundred per cent in 1908, one hundred and thirty per cent in 1909, and one hundred and fifty per cent in 1910. And, according to one of the findings of the trial judge, the defendant's president, clerk and treasurer, upon different occasions since April 18, 1907, have denied to the plaintiff due recognition of his rights as stockholder in the corporation.

This bill was brought* to recover dividends declared since September, 1907, to compel the defendant corporation to recognize the plaintiff's rights as a stockholder, and for general relief. The judge ordered a decree in behalf of the plaintiff, made twenty-one findings of fact, and reported the evidence and all questions of law for our consideration; such order or decree to be entered as this court may direct.

It is not necessary for us to pass upon the validity of the by-law as such. But we assume for the purposes of this case, without so deciding, that the provisions contained therein may be found to bind the plaintiff, considered as a contract between him and the corporation. *New England Trust Co. v. Abbott*, 162 Mass. 148. *Barrett v. King*, 181 Mass. 476. Nevertheless, on the findings of fact made by the trial judge, the plaintiff is entitled to relief. He finds among other things that the defendant never sought to enforce By-law XIII against any other stockholder, notwithstanding that a number of them have long been non-residents; that at the date of the demand the plaintiff had not resided in Worcester for some four years, to the knowledge of the defendant's directors and stockholders; that in seeking to enforce the by-law against the plaintiff the defendant's directors acted arbitrarily, capriciously and oppressively, and were influ-

* The suit was begun as an action at law by a writ dated December 31, 1909, and was changed to a suit in equity by an amendment on May 9, 1910. It was heard in the Superior Court by *King, J.*

enced by personal hostility to the plaintiff, or by resentment at his opposition to their wishes at one or more meetings of the stockholders; that the directors in attempting to enforce this by-law against the plaintiff are unreasonably discriminating against him and acting oppressively, with the settled purpose to compel him to surrender his stock at a great sacrifice in its value or to forfeit the dividends thereon.

Clearly such conduct and attitude on the part of directors, when exercising powers of a fiduciary nature, is not action in good faith in the interest of the corporation and will be interfered with by a court of equity. *In re Bell Brothers*, 65 L. T. R. (N. S.) 245. *Ex parte Penney*, L. R. 8 Ch. 446. *Robinson v. Chartered Bank*, L. R. 1 Eq. 32.

It is strenuously urged on behalf of the defendant that these findings of fact are not warranted. From a mere reading of the printed record some of them may appear extreme. But the judge who saw and heard the witnesses, among whom were the officers complained of,* was better able to determine their motives and credibility than we can be, and his findings must stand, as we cannot say that they are clearly wrong. *Crowell v. Keene*, 159 Mass. 352. *Skehill v. Abbott*, 184 Mass. 145. *Revere Water Co. v. Winthrop*, 192 Mass. 455, 459.

A decree is to be entered ordering the defendant to pay to the plaintiff the dividends withheld from him, with interest, also enjoining the directors from enforcing their vote of April 12, 1907, and from denying to the plaintiff his rights as a stockholder, and for his costs.

So ordered.

E. T. Esty, for the plaintiff.

C. M. Thayer, (*J. O. Sibley* with him,) for the defendant.

* There were four witnesses who testified orally at some length.

PETER KUSHNIZKI vs. NEW ENGLAND BISCUIT COMPANY.

Worcester. October 8, 1911. — October 17, 1911.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DECOURCY, JJ.

Negligence, Employer's liability: superintendence, fellow servant.

Where, at the trial of an action by an employee in a factory against his employer, to recover for injuries received while cleaning the dies and cutter of a "cookie machine," there was evidence tending to show that the machine had been stopped for the purpose of being cleaned just before the close of the day's work, that a superintendent of the defendant had given the plaintiff orders to clean the gears of the machine and had stood by while the work was going on and that the plaintiff was following his instructions when he was injured by the superintendent starting the machine without giving him any warning, the mere fact that the plaintiff put his thumb instead of a brush on the gears will not as matter of law prevent the plaintiff from recovering, because he had a right to expect that the machine would not be started until the cleaning was finished and to rely on receiving a warning from the superintendent before the superintendent deliberately set it in motion.

A superintendent in a factory had caused a machine to be stopped for cleaning and had directed an employee to clean it and had stood by while the employee did the work in accordance with his instructions. While the employee was at work upon the gearing of the machine, the superintendent started it and the employee was injured. In an action by the employee against his employer under St. 1909, c. 514, § 127, cl. 2, the defendant contended that the plaintiff could not recover because the act of the superintendent in starting the machine was an act of a fellow servant. *Held*, that the superintendent's decision to put the machine in motion caused the injury, and that such decision was an act of superintendence.

TORT under St. 1909, c. 514, § 127, cl. 2, for personal injuries received by the plaintiff while in the defendant's employ in its factory in Worcester and alleged to have been caused by the negligence of a superintendent of the defendant. Writ dated September 25, 1909.

In the Superior Court the case was tried before Aiken, C. J. The facts are stated in the opinion.

At the close of the evidence, the Chief Justice refused to give rulings asked for by the defendant to the effect that on all the evidence the plaintiff was not in the exercise of due care, that the superintendent was not negligent, and that the plaintiff could not recover.

The jury found for the plaintiff in the sum of \$750; and the defendant alleged exceptions.

C. C. Milton, for the defendant.

P. T. Dolan, for the plaintiff.

BRALEY, J. The plaintiff among other duties of his employment was required to clean the dies and cutters of a "cookie machine," and while about the work it was set in motion, cutting off the thumb of his right hand. It was in evidence that the machine when in operation did not become clogged, and the plaintiff had been instructed to clean only when it had been stopped for the purpose just before the close of the day's work. The evidence would have warranted the jury in finding, that one Hutchins, whose orders to clean the machine where he was injured the plaintiff obeyed, had been entrusted with superintendence as his sole or principal duty, and that not only in cleaning the gears did the plaintiff follow the instructions given to him, but if Hutchins, who stood by while the work was being done, had not started the machine without giving the plaintiff any warning, the accident would not have happened. *Griffin v. Joseph Ross Corp.* 204 Mass. 477. *Carney v. A. B. Clark Co.* 207 Mass. 200, 206, 207.

The defendant's first contention is, that because the plaintiff put his thumb on the gears instead of using the brush he was careless. But the plaintiff knew that the machine had been stopped at the usual time for him to clean, and had the right to expect that it would not be started until the process had been finished. Moreover the personal supervision of the superintendent, accompanied by his directions to the plaintiff while performing the work, was an assurance that the machine would remain at rest until the gears had been cleaned, or that he would be warned before it was deliberately set in motion. The question of the plaintiff's due care was for the jury. *Meagher v. Crawford Laundry Machinery Co.* 187 Mass. 586, 588. *Jellow v. Fore River Ship Building Co.* 201 Mass. 464. *Griffin v. Joseph Ross Corp.* 204 Mass. 477, 481.

It is next urged that the act of Hutchins in starting the machine was the act of a fellow servant and not an act of superintendence. But his decision to put the machine in motion was within the scope of his authority, and caused the injury. *O'Brien*

v. *Look*, 171 Mass. 36. *Roche v. Lowell Bleachery*, 181 Mass. 480. *Meagher v. Crawford Laundry Machinery Co.* 187 Mass. 586. *McPhee v. New England Structural Co.* 188 Mass. 141. *Silvia v. New York, New Haven, & Hartford Railroad*, 203 Mass. 519. *Mooney v. Benjamin F. Smith Co.* 205 Mass. 270.

The exception to the exclusion of evidence has been waived ; and as the first, second, sixth and seventh requests upon which the defendant relied at the argument were rightly refused for the reasons above stated, its exceptions must be overruled.

So ordered.

OTTO B. ENGLEMAN vs. BOSTON AND MAINE RAILROAD.

Hampshire. October 8, 1911. — October 17, 1911.

Present: RUGG, C. J., HAMMOND, BRALEY, & SHELDON, JJ.

235-411
235-514
238-1395

Negligence, Gross or wilful. Railroad.

In an action against a railroad corporation under St. 1906, c. 463, Part II, § 245, for personal injuries and damage to the plaintiff's horse, carriage and harness alleged to have been sustained by reason of the defendant's failure to give where its railroad crossed a highway upon the same level the signals required by Part II, § 147, of the same chapter, it was found specially, on evidence warranting such a finding, that the required signals were not given, and the defendant relied on the defense that the plaintiff was guilty of gross or wilful negligence which contributed to the injury. The plaintiff testified that, although the night was dark, he could see the way as he drove along in his buggy with a tired, gentle horse, moving no faster than a slow walk, that he knew that the highway was crossed by the railroad at grade, and that, on approaching the crossing, he looked and listened for passing trains, that he saw and heard nothing and received no warning from any bell or whistle, that he drove on the track, and then, suddenly seeing the headlight of an engine and appreciating his peril, he urged his horse forward with the whip, but that instantly the engine struck the team, injuring the plaintiff and damaging his property. *Held*, that there was evidence for the jury that the plaintiff was not guilty of gross or wilful negligence.

TORT under St. 1906, c. 463, Part II, § 245, for personal injuries and damages to the plaintiff's horse, carriage and harness alleged to have been sustained by reason of the defendant's failure to give the signals required by Part II, § 147, of the same chapter at a place where the defendant's railroad crosses upon the same level a public highway in Belchertown, on which the plain-

tiff was driving, when an engine of the defendant was driven against the plaintiff's horse and carriage, overturning them and throwing the plaintiff violently to the ground. Writ dated May 16, 1910.

The defendant's answer consisted of a general denial.

In the Superior Court the case was tried before *Hitchcock, J.* The evidence is described in the opinion.

At the close of the evidence the defendant asked the judge to rule "that there was not sufficient evidence to warrant the jury in finding that the plaintiff was in the exercise of legal care." The judge refused to rule as requested, and submitted the case to the jury.

The judge also submitted to the jury the following question: "Did the defendant neglect to give the signals as required, on approaching the crossing?" The jury answered, "Yes."

The jury returned a verdict for the plaintiff in the sum of \$850; and the defendant alleged exceptions.

The case was submitted on briefs.

R. W. Irwin, for the defendant.

A. L. Green & F. F. Bennett, for the plaintiff.

BRALEY, J. The jury upon conflicting evidence having specially found that the signals required by St. 1906, c. 463, Part II, § 147, were not given, the defendant relies only upon the defense, that as matter of law the plaintiff was grossly or wilfully negligent.

The night was dark, but the plaintiff testified, that he could see the way as he drove along in his buggy with a tired, gentle horse moving no faster than a slow walk. He knew that the highway crossed the railroad at grade, and on his approaching the crossing he looked and listened for passing trains, but, not seeing or hearing a train or receiving any warning from bell or whistle, he drove on to the track. It was only after the horse had passed to the track that, suddenly seeing the headlight of the engine and realizing his peril, he urged him forward with the whip. But instantaneously the engine struck the team, injuring the plaintiff and damaging the horse, harness and carriage. We fail to discover in his narration of the circumstances anything tending to show a disposition to take the chance of getting safely over without regard to the movement of trains. The plaintiff

as he came to the crossing rightfully might expect that the statutory signals would be given. *McDonald v. New York Central & Hudson River Railroad*, 186 Mass. 474. And, "if the signals were not sounded, the jury might infer that the absence of them caused the accident." *Lamoureux v. New York, New Haven, & Hartford Railroad*, 169 Mass. 388, 389.

The burden of proof rested on the defendant, and, if it be assumed that the request which was refused, "that there was not sufficient evidence to warrant the jury in finding that the plaintiff was in the exercise of legal care," raised the question argued, it was open to the jury to find on the plaintiff's testimony that his conduct was consistent with ordinary caution, or at least that he was not grossly careless. *Clark v. Boston & Maine Railroad*, 164 Mass. 484. *Doyle v. Boston & Albany Railroad*, 145 Mass. 386. *McDonald v. New York Central & Hudson River Railroad*, 186 Mass. 474, 479. *Brusseau v. New York, New Haven, & Hartford Railroad*, 187 Mass. 84. *Slattery v. New York, New Haven, & Hartford Railroad*, 203 Mass. 453, 459.

Exceptions overruled.

JAMES CROSIER & another vs. ORBE A. KELLOGG & another.

Hampshire. September 19, 1911. — October 20, 1911.

Present: RUGG, C. J., HAMMOND, LORING, & BRALEY, JJ.

Equity Pleading and Practice, Master's report. *Deed. Fraud.*

In a suit in equity, where the case is referred to a master under an order of court which does not require him to report the evidence but only to report his findings with such facts and questions of law as either party may request, the master's findings of fact upon unreported evidence cannot be revised upon exceptions taken to his report.

In a suit in equity a motion to recommit a master's report with an order to report the evidence upon which certain findings of fact made by the master were based is addressed to the sound discretion of the trial judge.

In a suit in equity by a man and wife of advanced years to set aside a deed of their homestead made by them in consideration of love and affection, with the reservation of a right of occupation during their joint lives, where the bill alleges that the execution of the deed in the form in which it was delivered was procured by the fraud and undue influence of the defendant and that at the time of its execution the man plaintiff had not sufficient mental capacity to make the conveyance, the issues raised by these allegations are questions of fact, on which

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211 - 230
211 - 246
212 - 296
215 - 247
216 - 393
224 - 2175

the findings of a master on unreported evidence, that the essential allegations of the bill have not been established, will not be revised, unless upon his recital of the circumstances under which the deed was executed and delivered his conclusion is shown to be plainly wrong, which here was not the case.

BILL IN EQUITY, filed in the Superior Court on April 10, 1910, by James Crosier and Mary H. Crosier, his wife, against Orre Anzellette Kellogg and Joseph Kellogg, her husband, to set aside a deed from the plaintiffs to the first named defendant conveying to her the plaintiffs' homestead on East Street in Amherst subject to a right of occupation by the plaintiffs during their lives, praying for an order of reconveyance.

The bill alleged that the defendants agreed with the plaintiffs that the defendants, upon the receipt and delivery of the deed in question, would come to reside in the dwelling house upon the real estate, and would support and care for and furnish food, clothing, lodging and medical attendance to the plaintiffs, and would care for the plaintiffs in a kindly manner, consistent with their station in life, during the terms of their lives, at the sole expense of the defendants and without cost and expense to the plaintiffs, and that the defendant Joseph M. Kellogg agreed with and promised the plaintiffs that he would have prepared a deed of the real estate for the plaintiffs to sign, and would have incorporated in it, as a part of the consideration for the deed, the agreement with reference to the care and support of the plaintiffs; that the defendant Joseph M. Kellogg represented to and told the plaintiffs that the deed presented for their signatures was the deed which they had talked about, and that it contained all of the provisions and agreements mentioned; that the plaintiffs, placing reliance and confidence in the good faith and honesty of the defendant Joseph M. Kellogg, and understanding and believing that the deed contained the agreements referred to and that the agreement with reference to the care and support of the plaintiffs was incorporated in the deed as a part of the consideration thereof, and without reading the deed, affixed their names to it, but that the agreement with reference to care and support was not in the deed.

The portion of the deed containing the recital of the consideration was as follows: "Know all men by these presents that I James Crosier of Amherst, County of Hampshire, and State of

Massachusetts, in consideration of my love and affection for, and labor rendered in sickness and in health, and for many acts of kindness to myself and family rendered at various times by Mr. Joseph Kellogg and wife, the receipt whereof is hereby acknowledged, do hereby give, grant, bargain, sell and convey unto the said Orre Anzellette Kellogg, (wife of said Joseph M. Kellogg) a certain tract of land situate in (East Street, so called) in Amherst, County of Hampshire and State of Massachusetts, with the buildings thereon, Bounded and described as follows, viz: "

The reservation clause in the deed was as follows: "Reserving however, the right to occupy without cost to me, the premises conveyed by this deed during the lifetime of myself and wife. Also reserving the right granted to William W. Hunt, to cross my land with water pipes by deed recorded in Book 383, Page 195."

Mary H. Crosier, the wife of James, joined in the deed.

By an order of court the case was referred to Edward L. Shaw, Esquire, as master, "to hear the parties and their evidence and report his findings to the court together with such facts and questions of law as either party may request."

The master, among other findings, found that the fair market value of the land and buildings described in the deed at the time of the conveyance was \$1,700; that no payment of money was made to the plaintiffs for the deed in question; that the deed was made as a gift to the defendant Orre A. Kellogg in consideration of the plaintiffs' affection for her and for the defendant Joseph M. Kellogg, in token of the plaintiffs' gratitude for the acts of kindness, aid and assistance rendered to them by the defendants; that there was no agreement that the deed in question should contain a contract for the life support and care of the plaintiffs; that no such agreement was made between the parties before the execution of the deed, and that such an agreement was not a part of the consideration therefor; that the signatures of the plaintiffs to the deed were not procured by misrepresentation or fraud; that at the time of signing the deed the plaintiff James Crosier was mentally competent to execute it; and that the plaintiffs were not improperly influenced by either of the defendants to sign the deed.

The plaintiffs filed exceptions to the master's report. The plaintiffs also filed a motion that the report of the master be re-committed and that the master be ordered to report the evidence

upon certain findings of fact and the plaintiffs' requests for findings of fact. The plaintiffs also filed a motion that issues might be framed for a trial by jury. The case was heard by *Hitchcock, J.*, who made an interlocutory decree, denying the motion to recommit the master's report, denying the motion to frame issues for a jury, overruling the plaintiffs' exceptions to the master's report, and confirming the master's report.

Later a final decree was entered that the bill be dismissed. The plaintiffs appealed from the final decree, and also appealed from the portions of the interlocutory decree denying the plaintiffs' motion to recommit the master's report and overruling the plaintiffs' exceptions to the master's report.

W. J. Reilley, for the plaintiffs.

J. C. Hammond & T. J. Hammond, for the defendants, were not called upon.

BRALEY, J. The order of reference did not require the master to report the evidence, but only such facts and questions of law as either party might request, and his findings of fact upon unreported evidence cannot be reviewed or revised on the exceptions taken by the plaintiffs to his report. *East Tennessee Land Co. v. Leeson*, 183 Mass. 37. *Sawyer v. Commonwealth*, 185 Mass. 356, 359. *Taber v. Breck*, 192 Mass. 355. *Kennedy v. Welch*, 196 Mass. 592, 594.

The motion to recommit, and that the evidence upon which the findings rested be reported, was addressed to the sound discretion of the trial judge, and nothing appears in the record to indicate that the denial of the motion was wrong. *Henderson v. Foster*, 182 Mass. 447. *Duffy v. Hogan*, 203 Mass. 297.

But, if the interlocutory decree should not be reversed, the plaintiffs contend that upon the findings they are entitled to a decree. The substantive issues raised by the pleadings, whether through the fraud and undue influence of the defendant Joseph M. Kellogg, practised upon the plaintiff James Crosier, the deed was procured in the form in which it was delivered, and whether at the time of its execution James Crosier had sufficient mental capacity to make the conveyance, were questions of fact. *Woodbury v. Woodbury*, 141 Mass. 329. *Reed v. Mattapan Deposit & Trust Co.* 198 Mass. 306, 314. If the advanced age of the plaintiffs and the confidence reposed by them in the principal defend-

ant were important facts for the consideration of the master, we cannot say upon his recital of the circumstances which led to the execution and delivery of the deed conveying their homestead upon a meritorious consideration, with the reservation of a life estate for their joint lives, that his conclusion that the essential allegations of the bill as amended had not been established, was plainly wrong.

Decree affirmed.

CLARENCE E. HALL vs. JOHN M. SEARS, executor.

241-421

Franklin. September 19, 1911. — October 20, 1911.

Present: RUGG, C. J., HAMMOND, LORING, & BRALEY, JJ.

Deed. Evidence, Presumptions and burden of proof. Contract, Consideration.

A deed of land, which purports on its face to have been "signed, sealed and delivered in the presence of" a witness whose name is signed, is presumed in the absence of anything appearing to the contrary to have been executed on the day of its date and to have been delivered.

A promise, by the grantor in a deed purporting to convey an undivided half of a certain farm, to record the deed, which the grantor since its execution had retained in her possession unrecorded, made, after the death of the person named in the deed as grantee, to and at the request of the devisees of all the interest in such farm of such grantee, who held at the time of his death the record title to only one undivided half of the farm, is a good consideration for a promise on the part of such devisee to furnish the grantor with firewood during her life, even if the deed was invalid by reason of its non-delivery to the grantee in his lifetime.

HAMMOND, J. This was an action to recover for wood sold and delivered by the plaintiff to Lydia H. Miles, the defendant's testatrix. At the trial the plaintiff proved the delivery of the wood and that he had not been paid. The only defense relied upon was that the wood had been delivered under a special contract between the plaintiff and Mrs. Miles, the testatrix, and that the contract had been fully performed by the latter. Before rehearsing the terms of the alleged contract it will be convenient to state the circumstances under which it was made.

There was evidence that in January, 1896, Mrs. Miles and her sister Clarissa Hall, being then the owners of an undivided half of a certain farm, caused a deed to be made purporting to convey

to their brother Orville Hall their interest in it, but this deed was not to pass out of the hands of the grantors, nor be recorded, and if both grantors survived Orville Hall the deed was to be destroyed. Clarissa died before Orville, and there was evidence that after her death he paid her heirs for her share, being one undivided fourth, Mrs. Miles letting him have the money for that purpose; and that at that time Orville said to Mrs. Miles, "Now if you still wish me to have the place you keep the deed; but if you survive me, burn up the deed and it will be as if never executed." Orville died on July 9, 1903, leaving Mrs. Miles surviving him and still in possession of the deed. His will contained a clause devising all his interest in this farm to the plaintiff and one Lucy M. Barrows. There was evidence that after the death of Orville the special agreement above named was made, by the terms of which Mrs. Miles was to cause this deed to be recorded and in consideration of such recording the plaintiff was to furnish her with firewood during her lifetime and to "bank" her house; and that in pursuance of this agreement she caused the deed to be recorded on August 24, 1903. The plaintiff denied that any such agreement was made. The case was submitted to the jury on this issue alone, with instructions* to find for the defendant if such an agreement was made; otherwise for the plaintiff. The jury found for the defendant.

It is urged by the plaintiff that there was no evidence that the agreement was made before the deed was recorded, and that if it was made after the recording it was without consideration. But the verdict shows that under the instructions the jury must have found that the agreement was made before the deed was recorded, and there was ample evidence to support such a finding. It is further urged by the plaintiff that "the recording of the deed by the testatrix could not in any event be adequate consideration for the alleged promise, because if the deed was delivered to Orville in his lifetime, she had no control over it or interest in it, and if it was not delivered in his lifetime, she could not make a delivery to him after his death which would pass title or be a valuable consideration for the alleged promise."

In considering this objection it is to be noted that the deed was duly executed and acknowledged in January, 1896, several

* By Crosby, J.

years before the death of Orville Hall, the grantee; that by the will of Orville, who died in July, 1908, one half of his interest in the farm passed to the plaintiff; that Orville at his death had a record title to one undivided half of the farm and no more; that the deed purported upon its face to have been "signed, sealed and delivered in the presence of A. D. Flower;" that in the absence of anything to the contrary the presumption is that a deed thus witnessed was executed on the day of its date and was duly delivered. *Smith v. Porter*, 10 Gray, 66. *Howe v. Howe*, 99 Mass. 88. Consequently the record of such a deed would give an apparent record title of this undivided half to Hall under whom the plaintiff claimed. And that would be so even if, by reason of the non-delivery of the deed to Hall in his lifetime, the deed in fact was invalid and the apparent record title for that reason would not be in accordance with the true legal title. It is quite likely that both parties to the agreement supposed that the recording of the deed would not only complete the record title, but would settle any question as to ownership of the part therein described. But however that may be, and whether the deed was valid or not, the delivery of the deed, so that it could be recorded was an act that Mrs. Miles could not have been compelled to perform, an act which the plaintiff desired she should perform, and which he evidently supposed would enure to his profit. She was induced to perform this act by a promise on his part. No authorities are needed to support the proposition that under these circumstances there was a valid consideration for the promise to furnish the wood and that the plaintiff is bound by the agreement. He got what he wanted and must be held to do as he agreed.

Several exceptions were saved to the ruling of the presiding judge as to the admission of evidence. The deed and will of Orville Hall were properly admitted. Each tended at least to show the interest the plaintiff had in the apparent record title. The other exceptions to the rulings upon evidence are not argued upon the plaintiff's brief and in view of their nature we consider them waived.

Exceptions overruled.

W. A. Davenport, for the plaintiff.

C. N. Stoddard, (*D. Malone* with him,) for the defendant.

233-495
239-6215
243-244
244-244
245-245
247-247

KATHERINE A. MURRAY vs. POSTAL TELEGRAPH-CABLE COMPANY.

Berkshire. September 12, 1911. — October 21, 1911.

Present: RUGG, C. J., MORTON, HAMMOND, & BRALEY, JJ.

Messenger Service. Agency, Existence of relation. Bailment. Negligence, Of messenger boy. Conversion. Contract, Exempting messenger company from liability. Evidence, Judicial notice, Competency. Damages.

At the trial of an action against a corporation, engaged in the business of furnishing on application messengers to carry parcels, to recover the value of a parcel delivered to such a messenger, there was evidence tending to show that the plaintiff, a dressmaker, had been accustomed to procure from the defendant messengers for the delivery of parcels, that on the occasion in question, upon her applying for a messenger, a boy appeared whom she often had used before and had confidence in, that, since she last had used him, the boy had become a clerk in the defendant's office and in charge of its messenger boys and was no longer a messenger, that the plaintiff did not know that he no longer was a messenger and gave the parcel to him with specific directions as to the place at which it was to be delivered. The boy took the parcel to the defendant's office, where he delivered it to another boy who, either because of directions negligently given to him by the first boy or because of his own carelessness, lost it. *Held*, distinguishing *Haskell v. Boston District Messenger Co.* 190 Mass. 189, that the terms of his employment by the defendant made it impossible for the boy who received the parcel from the plaintiff to be her servant or agent; that, for lack of a mutual understanding between the parties, there was no express contract of employment and the defendant, having accepted the parcel for delivery for compensation and having assumed control and care of it, became a bailee so that the delivery of the parcel to the boy who lost it did not make that boy the plaintiff's agent; and that, whichever boy's negligence was the cause of the plaintiff's loss, the defendant was liable.

Where a corporation, engaged in the business of furnishing upon application messengers to deliver parcels, furnishes to a customer a messenger to whom the customer delivers a parcel for personal delivery because he has confidence in the messenger, the corporation has no right as matter of law to substitute another messenger to complete the delivery without the express assent of the customer, there being no such necessity for the employment of a sub-agent as to cause the customer's assent to such employment to be implied.

At the trial of an action against a corporation, engaged in the business of furnishing upon application messengers to deliver parcels, to recover for the loss of a parcel given by the plaintiff to a boy, who was sent to him by the defendant upon his application for a messenger and to whom the plaintiff delivered the parcel because, knowing him, he had confidence in him, it appeared that, unknown to the plaintiff, the boy who received the parcel no longer was a messenger but was a boy in charge of messengers for the defendant, and that he took the parcel to the defendant's office and, without the assent of the plaintiff, delivered it to a boy who lost it. The plaintiff asked the judge to instruct the jury in

substance that the defendant might be found liable for conversion if the jury were satisfied that in response to the plaintiff's order the defendant agreed to send a messenger to the plaintiff's place of business, and instead sent its servant, who was not authorized to act as messenger, but who without disclosing his want of authority wrongly received the bundle, which never was delivered as the plaintiff directed or returned to the plaintiff. *Held*, that the instruction could not have been given, because the original taking of the parcel from the plaintiff was without intent to assert any right of the defendant or to deny the plaintiff's title.

If a corporation engaged in the business of furnishing upon application messengers for the delivery of parcels receives a parcel from a customer as a bailee and not under such circumstances that any of its servants or agents becomes a servant or agent of the customer, and if the parcel is misdelivered by its employee, this constitutes a conversion for which the corporation is liable.

Where, at the trial of an action by a dressmaker against a corporation, which was engaged in the business of furnishing on application messengers for the delivery of parcels and which the plaintiff often had employed, for the loss of a parcel given to such a messenger for delivery, there is no evidence that the parcel was such that its appearance would deceive a person receiving it as to its value or any evidence of a rule or regulation of the defendant exempting it from liability in case a package of extraordinary value was given to one of its messengers or of a general custom that such companies received only parcels of small value, the jury should not be instructed that it was a matter of common knowledge that the defendant's business included only the delivery of packages not of great value and that, if the plaintiff delivered a valuable parcel to the messenger without notifying the defendant or its messenger of its value, he was not in the exercise of due care and could not recover; and the giving of such instructions, followed by a verdict for the defendant, constitutes error prejudicial to the plaintiff and warrants the sustaining of exceptions.

Where, at the trial of an action of tort by a dressmaker for the loss of certain gowns, it appears that the gowns may have no market value because they were made to order for a certain customer, evidence of the cost of the labor and material used in their construction is competent upon the question of damages.

CONTRACT OR TORT, with a declaration containing, after the allowance of successive amendments following the sustaining of sundry demurrers, three counts, the first of which alleged in substance that the defendant, which "undertakes to furnish reliable and trustworthy messenger boys to deliver messages and parcels within the city of Pittsfield," upon the request of the plaintiff for such a boy, sent to her a messenger boy well known to her to be trustworthy and reliable, to whom she delivered a package containing valuable dresses to be delivered at an address named by her and known to the messenger; that the messenger, "on the way to" the designated address, went to the defendant's office, "where the defendant's managers took the package from the messenger boy, and carelessly and negli-

gently delivered it to some boy or person wholly inexperienced and untrustworthy, and managed and conducted the carrying and delivering of said parcel in such a negligent and careless way that" it was lost. Another count alleged that the defendant had converted the gowns to its own use. A third count alleged in substance as the cause of the plaintiff's loss the fact that the second boy, who was untrustworthy and unreliable, had been chosen by the defendant without ordinary care in selection and without investigation being made or precaution taken to ensure his being reliable and trustworthy. Writ dated December 18, 1909.

In the Superior Court the case was tried before *Crosby, J.* There was evidence tending to show the following facts:

On October 14, 1909, the plaintiff, a dressmaker in Pittsfield, who was accustomed to use the defendant's messenger service in the delivery of parcels, called the defendant's office on the telephone and asked for a messenger. In response to her call one Tierney came. The plaintiff had used Tierney on former occasions, when he had acted efficiently, and he was a boy in whom the plaintiff had great confidence. On the occasion in question, however, Tierney no longer was a messenger, but was a clerk in charge of the messenger boys in the defendant's office. The plaintiff did not know that he no longer was a messenger boy. He did not wear a uniform or distinctive cap, either as a messenger boy or as a clerk.

The plaintiff delivered a parcel to Tierney with directions to take it to a Mrs. Cowles at 151 East Street, Tierney saying that he knew the place, having been there frequently. He took the parcel to the defendant's office, laid it down and a few minutes later handed it to one Schwatz (called elsewhere in the bill of exceptions Schwartz), a messenger boy in the defendant's employ.

Tierney testified that with the parcel he handed to Schwatz a slip bearing the words "Mrs. Murray" after the words "Called by" which were printed thereon, and that he wrote upon the slip the address "Mrs. Cowles, 151 East Street," after the printed words "Sent to."

Schwatz, who was twelve years old at the time, testified that the slip had on it the name "Mrs. Murphy" and that Tierney

told him to take it to "Murphy, 151 East Street." He went to East Street, could not find number 151, "asked some ladies and they didn't know anybody by" the name Murphy, "and I asked some men and they said they didn't know, until I came to one man and that man says 'That man over there is Mr. Murphy,' and I asked him and he says, 'Yes, his name was Mr. Murphy,' and he took the bundle and went away."

At the close of the evidence, the plaintiff asked that the jury be instructed as follows :

"1. If you find that Tierney as the agent of the defendant company was authorized by the company to take parcels and bring them to the office of the company and there deliver them to its messenger boys to be carried to their destination and was authorized to instruct such boys what to do with the parcels and that plaintiff did not know these facts but supposed that the clerk was to be her messenger and that Tierney did take this parcel to the office of the company and gave it to Schwatz to take to its destination, then Schwatz would be the servant of the defendant and if the parcel was lost through Schwatz's negligence, the defendant would be liable.

"2. If you find that Tierney as the agent of the defendant company was authorized by the company to take parcels and bring them to the office of the company and there to deliver them to its messenger boys and that he did not start to carry the parcel to its destination but in the course of a common practice took it to the office of the company and that he was negligent either in writing a wrong name on the slip accompanying the parcel or by failing to put in the name of Cowles or that he was negligent in choosing Schwatz for this errand and negligence in any of these particulars caused the loss of the parcel, then the defendant would be liable.

"3. If you find that Tierney as the agent of the defendant company was authorized by the company to take parcels and bring them to the office of the company and there to deliver them to its messenger boys and was not himself a messenger boy and that the undertaking fairly to be gathered from the plaintiff's telephone order and the defendant's answer was that the defendant should furnish a messenger boy to the plaintiff at her place of business, then it would follow that the defendant did not

furnish a messenger boy as agreed and that the defendant through its agent Tierney took the parcel from the plaintiff tortiously at the plaintiff's place of business, and the plaintiff could recover on her count in trover for conversion of the package provided it was lost and never returned to the plaintiff.

"4. The defendant is liable for the acts of the messenger boy Schwatz to whom the package was delivered by the clerk in charge of the company's business.

"5. The defendant is bound to use ordinary care in the selection of its messenger boys and make investigations and take precautions to ensure the exclusion of all unfit persons and to secure persons of such mental and moral qualifications as render them trustworthy and if the defendant failed to take due precautions in these particulars and you find that the boy Schwatz was incompetent by reason of his being too young or on account of his age taken in connection with his mental and moral qualifications as you may judge them from his appearance and conduct on the witness stand, bearing in mind that he was then nearly two years younger than he is to-day and as you may judge them from his conduct on the night in question in getting the name 'Murphy' and handing the package and address slip to a man on the street, and if the defendant in using due precaution could not have hired Schwatz and the package was lost by reason of Schwatz's misconduct, the defendant would be liable."

The judge refused to give any of these instructions. Among other instructions contained in the charge to the jury were those stated in the opinion. The jury found for the defendant; and the plaintiff alleged exceptions.

J. Barker, (*M. B. Warner* with him,) for the plaintiff.

E. P. Carver, *G. P. Wardner* & *R. E. Goodwin*, for the defendant, submitted a brief.

BRALEY, J. The instructions as to liability under which a general verdict was returned for the company were largely, if not wholly, predicated upon *Haskell v. Boston District Messenger Co.* 190 Mass. 189, and portions of the opinion, defining the implied contract or duty of the defendant in that case and the care required in the selection of messengers, were quoted as applicable in the case at bar. But the ground upon which the defendant was exonerated in that case rested upon the contract with the plain-

tiff; and it was accordingly held that as the messenger received his instructions directly from the plaintiff he became the plaintiff's servant during the time of service, even if he continued in the general employment of the company. It was further decided, that under the bailment the defendant did not assume the liability of a common carrier, but contracted only that the messenger furnished should be a suitable person for the performance of the duty entrusted to him. *Haskell v. Boston District Messenger Co.* 190 Mass. 189, 192, 194. The duties and liability of the defendant in the present case however must depend upon the contract between the parties and the first inquiry is, whether one Tierney, who was sent to the plaintiff in response to a call from her for a messenger, became her servant or agent, and for whose subsequent conduct the defendant should not be held responsible. It was not in dispute, that although formerly a messenger, he had become a clerk having charge of the defendant's messengers, and that the plaintiff, who on former occasions had dealt with him as a messenger before he became clerk, and in whom because of his efficiency and honesty she reposed great confidence, was ignorant of the change in employment. The jury upon the evidence would have been justified in finding, that when the plaintiff delivered to him the bundle containing the gowns, she understood and believed that he was still in the defendant's general employment as messenger, and that having been sent at her request, he was subject to her orders for the time being. It is manifest that Tierney remained the servant of the defendant. The duty which he owed to the company of supervision of its messenger boys whose services might be required at any moment by customers, precluded his acting for the plaintiff as an errand boy, whom she could command, and whose acts she could control until the purpose for which she wished the aid of a messenger had been accomplished. See *Bowie v. Coffin Valve Co.* 200 Mass. 571, 578; *Shepard v. Jacobs*, 204 Mass. 110.

It is contended by the defendant, that it was accustomed to substitute for the messenger who answered a patron's call, and to whom the carriage and delivery of parcels had been committed by the patron, another messenger to perform the service, if the convenient management of its business required the change, and the jury were instructed that the substitution could be properly

made. But it is only where the principal assents, or where from the nature of the agency a sub-agent necessarily must be employed in transmission, that the assent of the principal is implied. *Dorchester & Milton Bank v. New England Bank*, 1 Cush. 177, 186. *Lowell Wire Fence Co. v. Sargent*, 8 Allen, 189, 192.

The defendant sent Tierney not as its messenger but as its clerk, and the jury upon the uncontradicted evidence could have found, that the plaintiff believing him to be a messenger, not only gave him specific directions for his guidance, but entrusted to him alone the duty of delivery. No express contract having existed for want of a mutual understanding between the parties, and the defendant as a bailee for compensation having voluntarily accepted the gowns to be forwarded, and assumed the control and care of them, their subsequent delivery by Tierney to the defendant's employee and messenger boy, one Schwatz, whom he selected, did not constitute Schwatz the plaintiff's servant or agent.

The defendant was fully informed of the nature and particulars of the service required. If through the negligence of Tierney in misdirecting the bundle when he returned to the defendant's office, or through the negligence of Schwatz, as the jury would have been warranted in finding upon the evidence, the gowns were never delivered to the plaintiff's customer, the defendant would be liable for the loss. *Newhall v. Paige*, 10 Gray, 366. *Maynard v. Buck*, 100 Mass. 40, 47. *Wood v. Remick*, 143 Mass. 453. *American District Telegraph Co. v. Walker*, 72 Md. 454. *Sleat v. Fagg*, 5 B. & Ald. 342. The plaintiff's first, second and fourth requests should have been given, and the instructions, that Schwatz was the plaintiff's servant for whose conduct the defendant would not be responsible, unless the jury found that the defendant did not exercise ordinary care in his selection and employment, were erroneous.

The plaintiff's third request, that the defendant might be found liable for conversion if the jury were satisfied that in response to the plaintiff's order the defendant agreed to send a messenger to her place of business, and instead sent its servant, who was not authorized to act as messenger, but who without disclosing his want of authority wrongly received the bundle, which was never delivered as she directed or returned to the

plaintiff, was rightly denied. The carrying away of the parcel by Tierney under the belief of the plaintiff that he was acting as messenger may have been unauthorized, but, the parcel not having been originally taken with intent to assert any right of the defendant or to deny the plaintiff's title, there was no proof of conversion. *Farnsworth v. Lowery*, 134 Mass. 512. *Berry v. Friedman*, 192 Mass. 131, 136.

But in connection with the fourth count and this request, it should be noticed, that if contrary to the plaintiff's directions the bundle or parcel was delivered to the wrong person, the delivery would be a conversion, as neither Tierney nor Schwatz was the plaintiff's servant. The rule is well stated by Mr. Justice Foster in *Hall v. Boston & Worcester Railroad*, 14 Allen, 439, 443: "A misdelivery of property by any bailee to a person unauthorized by the true owner is of itself a conversion, rendering the bailee liable in trover, without regard to the question of due care or degree of negligence. This is a well established legal principle, applicable to every description of bailment. . . . And a delivery to an unauthorized person is as much a conversion as would be a sale of the property, or an appropriation of it to the bailee's own use. In such cases neither a sincere and apparently well founded belief that the tortious act was right, nor the exercise of any degree of care, constitutes a defense even to a gratuitous bailee."

The plaintiff also excepted to the instruction, that "if the jury find that the plaintiff delivered to the defendant's messenger boy a package containing articles of great value without notifying the defendant or its messenger boy that said package did contain articles of great value, the plaintiff was not in the exercise of due care and cannot recover," and "that if the package was delivered and no notice of its contents was given to the company, or to anybody representing it, then this plaintiff is not entitled to recover." No evidence appears that the company had established any rules or regulations exempting it from liability, if packages of ordinary merchandise which it engaged to deliver were lost in transportation, nor was there proof of a general custom, that in common with other companies engaged in a similar business only packages of small value were received. In the absence of such evidence these instructions, and the further in-

struction, that it was a matter of common knowledge that the defendant's business included only the delivery of packages not of great value, misled the jury and were incorrect. *Barrie v. Quinby*, 206 Mass. 259, 264, 265. The defendant's agent on the evidence could have been found to have known that the plaintiff was a dressmaker who frequently had employed the company's messengers for the delivery of goods to her customers and it does not appear that the form of the bundle was such as to mislead him as to its character or value, and unless inquiry was made, she was under no obligation at common law to state the value and nature of the contents of the parcel. *Dwight v. Brewster*, 1 Pick. 50, 54. *Phillips v. Earle*, 8 Pick. 182. *Gage v. Tirrell*, 9 Allen, 299. *Dunlap v. International Steamboat Co.* 98 Mass. 371, 377, 378. And the jury should have been so instructed. The plaintiff is justified in the assumption, that this error of itself might have caused the jury to return a verdict for the defendant, even if under the instructions as to liability they were satisfied that the loss resulted from the incompetency of Schwatz, with notice of which they also found that the defendant was chargeable.

The exceptions to the admission of evidence really involve the measure of the plaintiff's damages. The gowns, having been made to order for a particular customer, may have had no market value, and evidence of the cost of the labor and material was competent as bearing upon the question.

We have considered the exceptions so far as argued by the plaintiff, and for the reasons stated there must be a new trial.

Exceptions sustained.

CHARLES A. MARCY vs. SHELBURNE FALLS AND COLRAIN
STREET RAILWAY COMPANY.

'Franklin. September 19, 1911. — October 21, 1911.

Present: RUGG, C. J., HAMMOND, LORING, & BRALEY, JJ.

Contract, Implied. Evidence, Materiality, Of state of mind. Practice, Civil, State-
ments of counsel, Exceptions, Ordering verdict, Judge's charge. Evidence, Presump-
tions and burden of proof. Corporation, Officers.

At the trial of an action against a street railway corporation to recover compensation for alleged special services rendered by the plaintiff when he was the defendant's president and one of its directors, a statement by the plaintiff's counsel in his opening to the jury, that the plaintiff's claim is based upon a contract with the defendant express as to employment although not as to price, does not preclude the plaintiff from relying upon a contract implied from the facts, if he can prove them, that he performed services of value to the defendant with the expectation on his part of compensation and under such circumstances as ought to have led the directors of the defendant as reasonable men to think that the services were to be paid for. In the present case the plaintiff failed to prove such facts and a verdict for the defendant was sustained.

At the trial of an action against a street railway corporation for the reasonable value of alleged special services rendered by the plaintiff when he was the defendant's president and one of its directors, the plaintiff excepted to the admission of testimony of directors of the defendant to the effect that they did not understand nor expect that the plaintiff was to be paid, and that his services were rendered in the capacity of president or director. *Held*, that the evidence was admitted properly, because, although the opinion of the directors was not material and their undisclosed purpose could not bind the plaintiff, their understanding at the time the services were rendered was relevant to show their expectation and knowledge, which in connection with all other attendant conditions bore upon the relations of the parties and the question whether the representatives of the defendant understood or as reasonable men ought to have understood that the services were performed outside those due from the plaintiff as president and director and were to be paid for.

In an action of contract, where the jury has returned a general verdict for the defendant, an exception by the plaintiff to the exclusion of evidence, which, if competent, related only to the amount of money due to the plaintiff, is made immaterial by the verdict.

At the trial of an action of contract, where upon issues of fact the evidence is conflicting and the burden of proof rests on the plaintiff, the jury must pass upon the credibility and the weight of the testimony and a request that a verdict be ordered for the plaintiff manifestly should be refused.

At the trial of an action against a street railway corporation for the reasonable value of alleged special services rendered by the plaintiff when he was the defendant's president and one of its directors, there is no error in a refusal of the presiding judge to instruct the jury, that corporations may incur contractual liability by implication to the same extent as an individual, because, assuming that this is

correct as an abstract proposition, it is not properly applicable to an action for compensation for services rendered by one who is the president and a director of the corporation sued, it being a matter of common knowledge that valuable services frequently are rendered to business, banking, insurance and public service as well as to charitable corporations by their president and directors under circumstances which are inconsistent with any presumption that compensation is to be paid.

The acceptance of valuable services or material benefits does not create an implied promise to pay for them where the services performed or the benefits conferred were intended to be gifts.

At the trial of an action against a street railway corporation for the reasonable value of alleged special services rendered by the plaintiff when he was the defendant's president and one of its directors, instructions to the jury are correct which state in substance, that, if the plaintiff at the time he rendered the services had no intention to claim compensation, there can be no recovery, but that, if the plaintiff's services were rendered with the expectation of pay and were accepted under such conditions that the officers of the defendant as reasonable men ought to have understood that they were to be paid for, there can be a recovery of the amount of their reasonable worth.

At the trial of an action against a street railway corporation for the reasonable value of alleged special services rendered by the plaintiff when he was the defendant's president and one of its directors, where there is ample evidence from which the jury may find that the attempt on the part of the plaintiff to collect pay for his services was an afterthought and that at the time of doing the work he did not contemplate making any charge for it, it is proper for the judge in his charge to the jury to refer to the circumstances shown by the evidence and to give illustrations of the grounds on which it might be inferred that the services were rendered gratuitously.

RUGG, C. J. This is an action of contract by which the plaintiff seeks to recover for alleged special services rendered to the defendant while he was its president and a member of its board of directors. Although the plaintiff's claim was stated by his attorney in opening to be based upon a contract with the defendant, express as to employment but not as to price, the case seems to have been tried on the general ground that the plaintiff might recover if he proved either an express contract of employment, or the performance of services of value to the defendant with the contemporaneous expectation on his part of compensation under such circumstances as ought to have led the directors of the defendant as reasonable men to think that they were to be paid for. The opening of counsel did not preclude the plaintiff from relying upon an implied contract, if the evidence proved one. *Harrington v. Baker*, 15 Gray, 538. The jury returned a verdict for the defendant.*

* The plaintiff alleged exceptions, which were allowed by *Schofield, J.*, who presided at the trial.

Testimony was admitted from directors of the defendant to the effect that they did not understand nor expect that the plaintiff was to be paid, and that his services were rendered in the capacity of president or director. The point in dispute upon this branch of the case was whether the representatives of the defendant in fact did understand or ought as reasonable men to have understood that the services were performed outside those due from the plaintiff as holding these offices, and were to be paid for. While the opinion of the directors was not material, their understanding at the time the events occurred was in one respect relevant. While their undisclosed purpose could not bind the plaintiff, their expectation and knowledge in connection with all other attendant conditions bore upon the relations of the parties and the existence of a definite agreement of employment. When the state of mind of a person is material, his testimony as to the subject is competent. *Carriere v. Merrick Lumber Co.* 203 Mass. 322. There is nothing inconsistent with this view in the discussion in *Marks v. Metropolitan Stock Exchange*, 181 Mass. 251, at 254, 255.

The plaintiff offered evidence of the annual reports made under oath to the Commonwealth showing the improved financial condition of the road during the period for which the plaintiff claimed compensation. The evidence was excluded. The only bearing, which this evidence, if competent, would have had, was upon the amount due to the plaintiff. The general verdict of the jury for the defendant renders this exception immaterial.

The first request for instructions, to the effect that a verdict for the plaintiff be ordered, manifestly should not have been given. An affirmative burden of proof as to issues of fact rested upon the plaintiff. The credibility and weight of the evidence he proffered was plainly for the jury.

The second request, to the effect that corporations may in general incur contractual liability by implication to the same extent as an individual, while perhaps sound as an abstract proposition (*Melledge v. Boston Iron Co.* 5 Cush. 158, 175, *North Anson Lumber Co. v. Smith*, 209 Mass. 383), was not precisely applicable to the facts in evidence. The plaintiff was himself a director and the president of the defendant corporation, and the same implied obligation to pay for services performed would not

arise in favor of such an officer to the extent that they would in favor of a third person. *Sawyer v. Pawners' Bank*, 6 Allen, 207. *Pew v. First National Bank of Gloucester*, 130 Mass. 391. It is common knowledge that valuable services are rendered frequently to business, banking, insurance and public service as well as to charitable corporations by their president and directors under circumstances which negative any presumption that compensation is to be paid. So far as necessary to enable the jury to pass intelligently upon the question submitted to them, the law was correctly explained in the charge.

The other requests, directed in general to the point that an implied obligation would arise to pay for beneficial services, were properly refused, for the reason that they all omitted the material modification that there could be no recovery if the services of the plaintiff were rendered as a gratuity and without any intention on his part to exact payment. There was considerable evidence, both direct and circumstantial, bearing upon this specific point. Even for valuable services performed or material benefits conferred there can be no recovery if, by reason of charity, good will, public spirit or otherwise, they are intended as gifts. The principles of law under which a contract might have arisen between the plaintiff and the defendant were correctly explained with sufficient amplification in the charge, and without violation of the principles set forth in *Worthington v. Plymouth County Railroad*, 168 Mass. 474, 478.

There was no error in the statement in the charge that "if an express contract requires a vote of the corporation . . . there is no express contract." This was merely an exclusion of one of the ways in which an express contract might be proved. It is not contended that there was any vote of the corporation. There is nothing inconsistent with this in *Gallagher v. Hathaway Manuf. Co.* 172 Mass. 230, at 232, where another phase of the words "express" and "implied" as applied to contracts was adverted to.

The exception to the instruction that the jury had no right to find in favor of the plaintiff "as a matter of equity and fairness between him . . . and the corporation" must be overruled. This portion of the charge was given in connection with the general proposition that there could be no recovery if the plain-

tiff had no intent at the time he rendered the services to claim compensation. In other parts of the charge the jury were instructed in accordance with the principles laid down in *Pew v. First National Bank of Gloucester*, 130 Mass. 391, and *Bartlett v. Mystic River Corp.* 151 Mass. 433, to the effect that the services of the plaintiff, if rendered with expectation of pay and accepted under such conditions that the officers of the defendant as reasonable men ought to have understood that they were to be paid for, then there could be a recovery to the amount of their reasonable worth.

There was ample evidence, from which the jury might have found that the attempt on the part of the plaintiff to collect pay for his services was an afterthought, and that at the time he was doing the work he did not contemplate making any charge for it. Hence the portion of the charge referring to these circumstances and giving illustrations of the grounds of gratuitous service were germane to the issues.

It does not appear that any exception was taken to a portion of the charge in substance that, if the plaintiff's right to compensation was subject to any condition, there could be no recovery unless the condition had been complied with. But, if the point be treated as open, no error is shown. It may well be that an implied contract, such as seems to have been chiefly relied upon by the plaintiff, would be subject to the reasonable condition that a demand should be seasonably made. The rights of the plaintiff, in view of his position as director and president of the defendant company, were amply protected by the charge. *Von Arnim v. American Tube Works*, 188 Mass. 515. *Fitzgerald & Mallory Construction Co. v. Fitzgerald*, 137 U. S. 98. *Corinne Mill, Canal & Stock Co. v. Toponce*, 152 U. S. 405.

Exceptions overruled.

W. A. Davenport, for the plaintiff.

D. Malone, (*C. N. Stoddard* with him,) for the defendant.

EDWARD W. SMITH vs. HOLYOKE STREET RAILWAY
COMPANY.

Hampshire. September 19, 1911. — October 21, 1911.

Present: RUGG, C. J., HAMMOND, LORING, & BRALEY, JJ.

Negligence, Due care of plaintiff, Street railway. Witness, Contradiction.

In an action against a street railway corporation for personal injuries caused by being run into by an electric car of the defendant as the plaintiff was driving with a horse and buggy from a cross road into a street on which the defendant operated its railway, if the plaintiff testifies in substance that, as he approached the street in which the defendant's tracks were, he was looking and listening for a car and that he neither saw nor heard any car and heard no gong until his horse was upon the track, when he saw an approaching car from sixty to ninety feet away, and that he used every effort to avoid a collision without avail, and if on the evidence it can be found that the plaintiff's view of the approaching car was obstructed to some extent by a hedge, the question whether the plaintiff was in the exercise of reasonable care is for the jury.

In an action against a street railway corporation for personal injuries caused by being run into by an electric car of the defendant as the plaintiff was driving with a horse and buggy from a cross road into a street on which the defendant operated its railway, where there is evidence in regard to the speed of the car, the time of sounding the gong or giving other warning of its approach, the obstructions to the view of travellers near the intersection of the ways, the distance within which the car could have been stopped, the distance which it went after the collision, and the point where the motorman first could have seen the plaintiff's horse come upon the track, and there is testimony of the motorman that he did not reverse the power earlier because he thought the plaintiff "would stop for he ought to have heard the bell," the question whether the defendant's motorman was negligent is for the jury.

In an action against a street railway corporation for personal injuries caused by being run into by an electric car of the defendant as the plaintiff was driving with a horse and buggy from a cross road into a street on which the defendant operated its railway, a witness, called by the plaintiff, testified that he was a passenger on the car at the time of the accident, that he did not hear the gong of the car rung until the collision "or just a second before," and that "when the motorman saw the position he was in then he rang his bell," that there was something unusual that attracted the witness's attention before the accident, and that he thought the speed of the car just before the accident was thirteen miles an hour, although he was not a good judge of the speed of a car. Thereupon the defendant offered to show that the witness immediately after the collision, on giving his name and address to the conductor, said, "If there is anything further you want of me, you will find me there, because it is no fault of you people." The presiding judge excluded this evidence. *Held*, that the exclusion of the evidence failed to show any harmful error; that the opinion of the witness in regard to the fault of the defendant plainly was immaterial to show such

fault, and that the holding of that opinion by the witness was not so incompatible with the facts testified to by him as to require its admission for the purpose of discrediting his testimony.

TORT for personal injuries alleged to have been sustained on July 6, 1908, by reason of the negligence of the servants of the defendant in running an electric car at an unreasonable and dangerous rate of speed and causing it to strike the buggy in which the plaintiff was and the horse which he was driving, as the plaintiff was turning from a cross road into Pleasant Street in Amherst. Writ dated October 3, 1908.

In the Superior Court the case was tried before *Stevens, J.* The evidence material to the decision is described or sufficiently referred to in the opinion. At the close of the evidence, the defendant asked the judge to rule that the plaintiff was not entitled to recover. The judge refused to make this ruling, and also refused to make certain other rulings requested by the defendant, and submitted the case to the jury, submitting to them also the question, "Was the plaintiff in the exercise of due care?" To this question the jury answered "Yes," and returned a general verdict for the plaintiff in the sum of \$535.47. The defendant alleged exceptions.

W. H. Brooks & W. Hamilton, for the defendant, submitted a brief.

W. J. Reilley, for the plaintiff.

RUGG, C. J. This is an action of tort to recover for damages sustained by the plaintiff through a collision with a car of the defendant, which occurred near a corner of two public ways in the town of Amherst.

The plaintiff, who was driving with a horse and buggy, testified in substance that as he approached the street, in which were the tracks of the defendant, he was looking and listening for a car all the way until his horse was on the track, and that he neither saw nor heard any car and heard no gong until his horse was upon the track, when first he saw an approaching car sixty to ninety feet away, and that he used every effort to avoid a collision without avail. It appears to be not open to doubt that the view of any one riding in such a vehicle as the plaintiff had was obstructed to some extent by an evergreen hedge. There was evidence from which the jury might have found that the

plaintiff could have seen the upper part of the car above the hedge, but it could not have been ruled that upon all the evidence they were bound to make such a finding. In view of these considerations, whether the conduct of the plaintiff conformed to the standard of reasonable care presented an inquiry of fact.

It has been said frequently that where a collision occurs at intersecting streets, between an electric car and a horse drawn vehicle, the general rule is to leave the questions of due care on the part of the plaintiff and of negligence on the part of the servants of the defendant to the jury. *Halloran v. Worcester Consolidated Street Railway*, 192 Mass. 104. *Eustis v. Boston Elevated Railway*, 206 Mass. 143, and cases there cited. *Doherty v. Boston & Northern Street Railway*, 207 Mass. 27. *Horsman v. Brockton & Plymouth Street Railway*, 205 Mass. 519. While cases sometimes arise which are so plain in their facts as to permit of no other reasonable construction than want of due care on the part of the plaintiff (see, for example, *Cokinos v. Boston Elevated Railway*, 209 Mass. 225, *Ferguson v. Old Colony Street Railway*, 204 Mass. 340, and cases cited), the present case falls within the general rule. The speed of the car, the time of sounding the gong or giving other warning of its approach, the obstructions to the view of travellers near the intersection of the ways, the distance within which the car could have been stopped, the distance the car went after the collision, and the testimony of the motorman, that "I didn't reverse earlier because I thought he [the plaintiff] would stop, for he ought to have heard the bell," and the point where the motorman first could have seen the plaintiff's horse come upon the track, were all circumstances to be weighed in determining whether the defendant's motorman was negligent.

One Sparrow, called as a witness by the plaintiff, testified that he was a passenger on the car at the time of the accident, that he did not hear the gong of the car rung until the collision "or just a second before, when the motorman saw the position he was in then he rang his bell," that "there was something unusual that attracted" the witness's attention before the accident, and that he thought the speed of the car just before the accident was thirteen miles an hour, though he was not a good judge of the speed of a car. Thereupon the defendant offered to show that the witness,

immediately after the collision, on giving his name and address to its conductor, said "If there is anything further you want of me you will find me there, because it is no fault of you people." In the rejection of this evidence the defendant fails to show any harmful error. It is plain that the opinion of the witness touching the fault of the defendant was of no consequence. The rights of the parties depend upon the facts existing at the critical moments, and not upon the opinion of a bystander as to the inference to be drawn from those facts. But it is urged that the statement was contradictory to his evidence, or, at least, that its "implications . . . tend in a different direction" (*Liddle v. Old Lowell National Bank*, 158 Mass. 15), and was admissible for this reason as affecting the weight to be given to his testimony. It is not directly inconsistent with any testimony he gave. But the test is not whether there is a pointed contradiction between the testimony and the statement made on another occasion. It is enough if an opinion has been expressed by a witness, which is so incompatible with the facts he has testified to as a witness, that an honest mind, knowing the facts, would not be likely to entertain the opinion. *Whipple v. Rich*, 180 Mass. 477, 479. *Boyle v. Boston Elevated Railway*, 208 Mass. 41. This question is a rather close one, but the facts that before the accident the attention of the witness was distracted until the gong sounded, and that he did not hear the gong rung until an instant before the collision, and that the speed of the car one hundred feet before it reached the place of the accident was thirteen miles an hour, do not appear so irreconcilable with exoneration from blame of the defendant's servants under the circumstances of this case as to require us to sustain the exceptions. *Commonwealth v. Mooney*, 110 Mass. 99.

The requests for instructions need not be reviewed in detail. So far as they are not covered by what has been said, they related to particulars of evidence, which were fairly dealt with in the charge.

Exceptions overruled.

FRANK HUGHES, administrator, vs. NORTHAMPTON STREET
RAILWAY COMPANY.

Hampshire. September 26, 1911. — October 21, 1911.

Present: RUGG, C. J., HAMMOND, BRALEY, & SHELDON, JJ.

Equity Pleading and Practice, Master's report, Appeal. *Corporation*, Transfer of shares. *Evidence*, Presumptions and burden of proof.

In this suit in equity by an administrator against a corporation and one of its shareholders, in which the plaintiff alleged that his intestate at the time of his death had owned shares of stock in a corporation which had been absorbed by the defendant corporation and that in a reorganization of the defendant corporation his rights had been given wrongfully to the individual defendant, a master to whom the case was referred found that, although a certificate for the shares in question, indorsed in blank by the person to whom they originally were issued, was found among the effects of the plaintiff's intestate after his death, from other facts it appeared that another person had owned the shares and had sold them to the individual defendant; and an appeal by the plaintiff from a decree overruling exceptions to the master's report was dismissed, the evidence not having been reported by the master and none of his findings necessarily being inconsistent with subsidiary findings reported by him.

In a suit in equity by an administrator seeking to establish his rights to certain shares of the capital stock of a corporation which he alleged were owned by the intestate at the time of his death, where the title to the shares is in dispute, evidence introduced by the defendant tending to show that, two years after the plaintiff's intestate practically had retired from business, he filed a voluntary petition in bankruptcy and that in the sworn schedules of his assets the shares in question were not mentioned, is competent and material.

BILL IN EQUITY, filed in the Superior Court on July 19, 1909, by the administrator of the estate of John Hughes late of Passaic in the State of New Jersey against the Northampton Street Railway Company and John C. Hammond, Esquire, averring in substance that at the time of his death the plaintiff's intestate was the owner of one hundred shares of the capital stock of the defendant railway company, "formerly named the Northampton and Williamsburg Railway Company," which certificate stood in the name of one Israel E. Sayres; that by reason of a reduction in the capital stock of the defendant the plaintiff was the owner of, and was entitled to receive a certificate for, sixteen and two thirds shares of stock of the defendant; that the defendant company had wrongfully issued to the defendant Ham-

mond and one M. H. Spaulding, now deceased, and that the defendant Hammond had notice of such unlawful issue when he received the certificate. The prayers of the bill were in substance for a recognition of the plaintiff's rights as owner of shares of the defendant corporation and for an accounting as to dividends paid to the defendant Hammond.

The case was referred to James L. Doherty, Esquire, as master. In his report he found the following facts :

In 1871 one hundred shares of the capital stock of the Northampton and Williamsburg Street Railway Company were issued to one Isaac Sayres, of New York city. A certificate representing these shares and numbered 171 was transferred by indorsement in blank on the back thereof dated in November, 1873, to one Kalley and by Kalley, without additional indorsement, to one Stiger. Both Kalley and Stiger also resided and did business in New York city.

John Hughes, the plaintiff's intestate, resided in New York city at and before 1871, removing therefrom to Maryland in 1876, but returning from time to time after the latter date for the purpose of transacting business. He was a real estate broker and commission merchant. In the early years of his residence in New York city he was in affluent circumstances, but later met with financial reverses and in 1878 became a voluntary bankrupt under the then existing national bankruptcy act. After 1876 he ceased to have any active business or income and until his decease in 1890 he was supported by his son, the plaintiff. The family, composed of the plaintiff's intestate, the plaintiff's intestate's wife, two daughters, and two sons, moved several times during the years between 1882 and 1886, when the intestate came to live with the plaintiff and continued to reside with him until his death.

When the intestate and his family removed from New York city to Maryland, among the family effects was a desk cabinet in which the intestate kept documents and papers. This cabinet remained with the family during the successive removals and was part of the effects of the intestate upon his decease. After his death, the key of the cabinet having been lost or its whereabouts unknown to the family, the cabinet was broken into and an inspection was made of its contents, among which was found

the certificate of the Northampton and Williamsburg Street Railway Company, numbered 171.

The plaintiff, being the son and administrator of the estate of John Hughes, came to Northampton on April 15, 1908, bringing the certificate in question, and sought to have this certificate transferred upon the books of the Northampton Street Railway Company, which had succeeded to the rights and property of the Northampton and Williamsburg Street Railway Company.

Previous to 1880 the defendant corporation took over the property of the Northampton and Williamsburg Street Railway and agreed to issue its stock in payment therefor in the proportion of one share for six. In 1880 certain persons living in Massachusetts, among whom was the defendant Hammond, became interested in the defendant corporation and proceeded to reorganize it under St. 1873, c. 48, and previous to doing so undertook to procure all the shares of stock in the corporation which they could obtain, including shares of the Northampton and Williamsburg Street Railway Company. Certificate numbered 171 in question fell under their notice and the stockholder of record, Israel E. Sayres, was communicated with. A postal card was received from him bearing date October 8, 1880, in which he stated: "I sold my stock three years since to J. N. Kally, Montague Street, Brooklyn." Under date of December 9, 1880, J. N. Kalley wrote in reference to this certificate: "John S. Stiger, 176 Broadway, is the owner of the stock I once held of the N. H. R. R. stock." Following this information, the defendant Hammond visited New York and called upon John S. Stiger at his place of business and interviewed him in regard to the shares of stock represented by certificate numbered 171. Stiger stated that he was the owner of the shares of stock in question and after some parleying bargained for the sale of the shares to the defendant Hammond. After the terms of the sale had been agreed upon Stiger searched about his office to find the certificate, but was unable to do so, and finally on December 22, 1880, for about \$150 signed a transfer of all his "right, title and interest in old Stock Certificate No. 171, one hundred Shares of the Capital Stock of the Northampton and Williamsburg Street Railway Company, now standing in the name of Israel E. Sayres," to Spaulding and the defendant Hammond.

Sayres, Kalley and Stiger all were dead at the date of the hearing and for a considerable number of years previous thereto. They all had been engaged in real estate and stock brokerage business and were engaged in such business when the plaintiff's intestate lived in New York and also was engaged in a similar business.

The plaintiff's intestate filed a voluntary petition in bankruptcy in 1878, accompanying which was a schedule of assets, but certificate numbered 171 was not listed in such schedule. This schedule was accompanied by the usual affidavit to the effect that it contained a list of all the property owned by the bankrupt at the date of the petition. On November 16, 1908, the assignee of the bankrupt estate of John Hughes, the plaintiff's intestate, assigned to the plaintiff his interest in certificate numbered 171.

The report continues: "I find that Stiger was the owner of the one hundred shares of stock represented by certificate 171 at date of sale of such shares to defendant Hammond, December 22, 1880, and the intestate did not come into possession of such certificate by payment of any valuable consideration for the shares represented by it, and the successors in title of Stiger and Hammond are by virtue of such succession the owners of the shares of stock issued by the Northampton Street Railway Company in exchange for or in lieu of shares of stock represented by said certificates.

"All facts material or conducing to the findings contained in the foregoing paragraph are set out in this report and such findings are based upon the facts found herein together with inferences to be legitimately drawn therefrom."

The first exception of the plaintiff to the master's report was as follows: "(1) The plaintiff excepts to the finding that the plaintiff's intestate filed a schedule of assets accompanying his petition in bankruptcy in which certificate No. 171 was not listed, and that this schedule was accompanied by the usual affidavit to the effect that it contained a list of the property owned by the bankrupt at the date of the petition for the reason that said schedule and accompanying affidavit were incompetent and inadmissible and were admitted in evidence over the objection of the plaintiff, and that the facts found by the master are

immaterial to any issue in this case." Other exceptions are described in the opinion.

The case was heard by *Sanderson*, J., who ordered a decree overruling the exceptions to the master's report, confirming the report and dismissing the bill. A decree was entered accordingly; and the plaintiff, consenting to a dismissal of the suit as to the defendant Hammond, appealed from its dismissal as to the defendant corporation.

The case was submitted on briefs.

R. A. Knight & E. H. Brewster, for the plaintiff.

S. S. Taft, for the defendant.

SHELDON, J. The decree appealed from was warranted upon the master's report. All but the first of the plaintiff's exceptions to that report rest simply upon the claim that the findings excepted to were unwarranted. But none of these findings are necessarily inconsistent with the subsidiary findings reported, and the evidence is not before us. It follows that we cannot sustain these exceptions. *Freeland v. Wright*, 154 Mass. 492. *Crosier v. Kellogg*, ante, 181.

As to the first exception, if we assume that the competency of the evidence can now be considered, yet the plaintiff has not directly argued that it was not competent for the defendant to prove and for the master to find conduct and statements of the plaintiff's intestate inconsistent with the claim that the intestate was the owner of the shares of stock in question. Manifestly this was competent and material.

The decree must be affirmed with double costs.

So ordered.

PUFFER MANUFACTURING COMPANY vs. JAMES H. KRUM, JR.

SAME vs. SAME.

Berkshire. October 4, 1911. — October 21, 1911.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DECOURCY, JJ.

Contract, In writing. *Evidence*, Extrinsic affecting writings, Admissions. *Practice*, Civil, Answer. *Damages*, In recoupment. *Agency*, Scope of authority.

Where, at the trial of an action upon a promissory note given as part of the purchase price of a soda water fountain furnished by the plaintiff to the defendant, it appears that before the note was delivered by the defendant the fountain had been delivered by the plaintiff to the defendant in accordance with an order in writing signed and delivered to a salesman of the plaintiff by the defendant, that there was no ambiguity in the description of the property in the order, that the order contained a stipulation that there were no agreements with the salesman except those therein stated and that the defendant would make no claim for anything not specified therein, that the fountain as furnished complied with the terms of the order and was reasonably fit for the uses and purposes for which it was intended, and that there was no suggestion by the defendant that there was any fraud on the part of the plaintiff, the defendant cannot introduce evidence of conversations between him and the plaintiff's salesman before the order was signed in which the salesman made statements regarding the quality of material, workmanship, finish and design of the fountain.

Where, in an action upon a promissory note alleged to have been given to the plaintiff by the defendant as part payment for a soda water fountain furnished upon the defendant's order in writing, it appears that a working plan furnished by the plaintiff was improperly drawn in such a manner as to make it necessary for the defendant to cut new holes in the fountain for outlet pipes and to rearrange the plumbing at a cost of \$100, but the answer contains no claim for damages in recoupment, the defendant is not entitled to have the amount of the expense thus incurred by him deducted from the amount due to the plaintiff on the note, but he should seek his remedy by a separate action.

The mere fact, that a manufacturer of soda water fountains gives to a marble worker, whom he has employed to set up a fountain for a purchaser, authority to receive delivery from the purchaser of a contract of conditional sale and lease of the fountain and of a cash payment and certain notes covering the purchase price, does not show that the employee had authority to bind the manufacturer by an admission as to imperfections in the fountain or by a statement that the manufacturer would "make things right," and in an action by the manufacturer against the purchaser on the notes given in part payment evidence of such an admission and statement is inadmissible.

DECOURCY, J. On June 28, 1906, the defendant signed and delivered to one Wood, a travelling salesman of the plaintiff corporation, an order for a soda fountain and apparatus. The order

described in detail the goods, the price and terms of payment. It contained no warranty of quality in material or workmanship. In the margin were printed the words: "There are no agreements with your salesman except those herein stated and no claim will be made by me for anything not specified herein." It was taken by the salesman subject to the approval of the plaintiff.

The plaintiff completed the fountain which was a "Constellation No. 23," and sent it from the factory to the defendant's store in North Adams, where it was set up by one Grant, a marble worker in the plaintiff's employ. Thereupon on September 10, 1906, the defendant, in accordance with the terms of his order, delivered to Grant a lease of the fountain and apparatus, a check for \$1,000 and fifty-four notes for the balance of the purchase price. The first twenty-four notes were paid as they became due. These actions were brought to recover the amount of seventeen of the notes that matured and were not paid.

The cases were referred to an auditor* with an agreement of the parties that his findings of fact should be final. Later they were heard upon the auditor's report by a judge of the Superior Court,† who found for the plaintiff for the full amount of the notes. The judge refused to make certain rulings of law requested by the defendant, and the cases are here on exceptions to such refusal and to the finding for the plaintiff.

The issues intended to be raised by the exceptions are (1) The admissibility of the conversations between the defendant and the plaintiff's salesman Wood previous to the written contract, descriptive of the quality of the material and workmanship in the soda fountain; (2) the sufficiency of the evidence to warrant a finding that the defendant accepted the fountain as a fulfilment of the contract of purchase; and (3) the right of the defendant to recoup for the cost of changes in the foundation and plumbing.

The auditor's findings establish the facts that the fountain as furnished and set up by the plaintiff complies with the terms of the defendant's written order and is the fountain described in the lease, and that it is reasonably fit for the uses and purposes for which it was made and intended. There is no ambiguity in the description of the property sold, and no suggestion of fraud.

* Carlton T. Phelps, Esquire.

† Crosby, J.

The parties intended the writing to be the complete and final record of all the terms agreed upon between them, and expressly so stipulated. Consequently the statements of the agent at and before the giving of the written order, regarding the quality of material, workmanship, finish and design, were properly excluded as an attempt to vary the effect of the written contract. *Neale v. American Electric Vehicle Co.* 186 Mass. 303. *Mears v. Smith*, 199 Mass. 319.

In view of the auditor's finding that the plaintiff complied with the terms of the written contract, the requests on the issue of the defendant's acceptance become immaterial. But we do not mean to intimate that the auditor was not justified in his finding, that the giving of the lease and check and payment of the notes after the defendant had full knowledge of the imperfections in the fountain was in fact an acceptance of the fountain as a fulfillment of the contract of purchase.

The auditor found that the working plan furnished by the plaintiff was improperly drawn in such manner as to necessitate cutting new holes in the foundation for the outlet pipes and rearranging the plumbing. This work was done by the defendant at an expense of \$100 and the auditor found that he should be allowed that amount. The trial judge did not credit the defendant with this sum, and the requests for rulings apparently do not raise any issue on the right to recover for this expenditure. However the charge could not properly be allowed on the pleadings as the defendant set up no claim of recoupment, and he must now seek his remedy by a separate action. *Hodgkins v. Moulton*, 100 Mass. 309. *Jackman v. Doland*, 116 Mass. 550. *Wentworth v. Dows*, 117 Mass. 14.

The first, second and fourteenth * requests clearly could not be

* The first and second requests were to the effect that on the pleadings and the auditor's report the plaintiff could not recover and that the defendant should have judgment. The tenth and the fourteenth requests were as follows:

"10. That the evidence of the statements made by the defendant to Grant and by Grant to the defendant at the time of the giving of the lease and notes should have been admitted."

"14. That the finding of the auditor that the soda fountain delivered was reasonably suitable for the purpose intended was erroneous."

As to the statements referred to in the tenth request, the auditor's report

given, on the facts found by the auditor. The tenth was rightly refused, as there was no evidence that Grant had any authority to bind the plaintiff by his statements. What we have already said disposes of the remaining requests, so far as they raise any issues of law.

Exceptions overruled.

The cases were submitted on briefs.

C. J. Parkhurst, C. P. Niles & H. P. Drysdale, for the defendant.

M. E. Couch, for the plaintiff.



JAMES H. NORTON vs. LILLIE S. LILLEY, executrix.

Hampden. September 26, 1911. — October 24, 1911.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Practice, Civil, Motion for continuance, Demurrer, Order of judgment, Exceptions. Superior Court. Executor and Administrator. Judgment.

In an action at law brought in the Superior Court by a minor by his guardian, a motion to continue the hearing of a demurrer was based on allegations that the judge who was to hear it and all the other judges of the Superior Court and of all other courts of the Commonwealth are members of the bar and of bar associations which form a "perfect labor union or law trust" which "controls every department of the government" and "selects all judges," that the judges protect the members of the bar in committing frauds and in robbing persons who are not members thereof, that the plaintiff's guardian was not a member of the "bar or law trust" and was a person to whom "the members of the bar association or law trust" were "hostile," and who was persecuted by them, that the judges of the court shared the hostility of "their brother members of the bar or law trust" toward the guardian and had assisted them to persecute him, and that it was "not in the bounds of humanity that any" of the judges was in a position to try the case. The judge who heard the motion denied it. *Held*,

shows that the defendant offered evidence tending to show that, at the time of setting up the fountain and of receiving the lease from the defendant, Grant stated in substance that the plaintiff would "make things right" as to certain imperfections in the fountain furnished. The auditor reported that "it was not shown in evidence that Grant had authority from the plaintiff to act as its agent in other respects than to set up the fountain according to the plans provided for him and to receive delivery of the several notes and lease from the defendant, and receive the defendant's check for the balance of purchase price."

that such denial was proper, because the motion was based upon allegations of fact of such a character that they could not be heard properly by a judge and could not be the ground for a continuance until they had been heard and determined in impeachment proceedings.

A motion to strike out a demurrer which in form is substantially in accordance with the wording of R. L. c. 173, § 16, cl. 2, properly may be denied.

An action at law cannot be maintained by one of the next of kin of an intestate against an attorney, employed by the administrator of the estate of the intestate, to recover for losses sustained by the estate by reason of fraud and malfeasance of the attorney in assisting the administrator to manage the personal estate in his possession, whether the administrator was a party to such wrongdoing or not. The only right of action in such a case is in the administrator and, if he refuses to perform his duty, the proper remedy is to have him removed and a new administrator appointed, whose duty it would be to recover from the wrongdoer or wrongdoers for the injuries thus done to the estate.

Where, upon the sustaining of a demurrer in the Superior Court, the plaintiff alleges an exception, no judgment should be directed to be entered until the exception is overruled unless the exception is adjudged immaterial, frivolous or intended for delay.

LOBING, J. 1. The first exception is to the refusal of the judge* to continue the case when the demurrer came on for argument. The plaintiff's motion to continue was based on the ground that the judge was disqualified. The alleged facts on which the plaintiff contended that he was disqualified were as follows: The judge in question and all other judges of the Superior Court and of all other courts of the Commonwealth are members of the bar and bar associations (the two are used as convertible terms in the motion). And the bar and bar associations form a "perfect labor union or law trust" which "control[s] every department of the government" and "select[s] all judges"; and further that the judges protect the members of the bar in committing frauds and in robbing those persons who are not members thereof. That the plaintiff's guardian and next friend † who appears here *pro se* "is not a member of the bar or law trust" and is a person to whom "the members of the bar association or law trust are hostile" and who has been persecuted by them. And further that the "justices of our Honorable Court share the same hostility as their brother members of the bar or law trust toward him and have assisted their brother attorneys in the bar or law trust to persecute him." The motion ends with

* Schofield, J.

† The plaintiff was a minor and Vincent E. Barnes was appointed his guardian by the Probate Court.

the allegation that in view of these facts "it is not in the bounds of humanity that any of the said justices are in a position to be judges to try this action." This is the substance of the motion. There are in addition statements of alleged specific acts of misfeasance by single justices which might well have been stricken from the record as scandalous. If these facts are true they constitute ground for impeachment of all the judges, to be brought by the House of Representatives (see c. 1, § 3, art. 6 of the Constitution), and tried by the Senate (see c. 1, § 2, art. 8 and art. 6 of § 3 cited above).

But these facts cannot from the nature of them be tried by any one of these judges and are not ground for a continuance until they are heard by the proper tribunal. This exception must be overruled.

2. The second exception is an exception to the order of the judge denying what was in effect a motion by the plaintiff to strike out the defendant's demurrer. This was based on the ground that the demurrer was not in accordance with R. L. c. 173, § 16. It is in the words of the second clause of that section, omitting the words "or some count thereof," and substituting for the concluding words thereof, to wit, "rules contained in this chapter," the words "rules contained in the Revised Laws of the Commonwealth and acts in addition thereto and in amendment thereof." This exception must be overruled. For similar cases see *Johnson v. Reed*, 136 Mass. 421; *Whiton v. Batchelder & Lincoln Corp.* 179 Mass. 169, and cases cited.

3. The third exception is to the order of the court sustaining the demurrer and ordering judgment to be entered for the defendant on the first Monday of March, 1911.

The judge was right in sustaining the demurrer. What the plaintiff alleges in his declaration is that he is a grandson and one of the three "heirs at law" of one Hiram R. Norton, who died intestate in 1901, the other two heirs being a son of the intestate and his widow. That the widow was duly appointed administratrix of the estate; "that the said admx., [*sic*] Jennie A. Norton, . . . employed the defendant's testator . . . as the attorney of the said estate to conduct the settlement of the said estate, collect its claims and to advise her in her conduct of the settlement of the said estate, and prepare and make her legal

papers and reports to the Probate Court, at the expense and as the attorney at law of the said estate." The plaintiff then alleges that the defendant's testator in collusion with the administratrix looted the estate and defrauded the plaintiff "out of his birthright and share of said estate." The plaintiff states in addition a variety of ways in which he alleges that the defendant's testator robbed the estate and neglected his duty as attorney for the administratrix in the collection of the assets and otherwise.

Upon the death of Hiram R. Norton and the appointment of his widow as administratrix of his estate the title to the personal property of Hiram vested in her as of his death, and a right vested in the plaintiff as one of the next of kin (entitled to a distributive share of the estate) to have the estate properly wound up and distributed.

If an attorney employed by an administrator to help him in winding up an estate robs the estate or neglects his duty to it, the administrator in whom is the title to the personal property constituting the estate and with whom the contract in such a case is made by the attorney, is the person who has the right to bring an action for the wrong so done. Such an action cannot be brought by a distributee because he had no title to the personalty constituting the estate (*Cummings v. Cummings*, 148 Mass. 340; *Pritchard v. Norwood*, 155 Mass. 539; *Flynn v. Flynn*, 183 Mass. 365), and because the duty owed by the attorney arises under a contract to which the distributee was not a party. The distributee's right is a right to have the estate properly wound up and distributed, and that right must be pursued in the Probate Court which has exclusive jurisdiction of such matters. See *Cummings v. Cummings*, *Flynn v. Flynn*, *ubi supra*, and *Putney v. Fletcher*, 148 Mass. 247.

If as is alleged in this declaration the administrator is a party to the fraud of the attorney, the remedy and the only remedy of the distributee is to have the administratrix removed and a new administrator appointed whose duty it will be to recover from both for injuries done by them to the estate. It appears from the papers annexed to the declaration in the case at bar that the administratrix of Hiram Norton's estate has filed a final account but that it has not been allowed.

At the argument the next friend and guardian of the plaintiff

sought to escape from this conclusion by contending that the real estate (or rather an undivided share of it) vested in the plaintiff on the death of the testator. But the plaintiff has not alleged that the defendant's testator was employed to see to what was Hiram Norton's real estate (which on his death became the real estate of the plaintiff, his uncle and grandmother) or that he (the defendant's testator) undertook to have anything to do with it. The allegation (which already has been quoted at length) is in substance that he was employed by the administratrix as attorney for the estate to conduct the settlement of it. If in winding up the estate a license was obtained to sell a parcel of land, the attorney of the administratrix would have to do with that piece of real estate and with the proceeds of the sale of it. When land of the intestate is sold under a license granted by the Probate Court, the title of the heir is divested and the real estate is converted into personalty and stands on the same footing as the personal property left by the intestate. But with respect to the other real estate of the intestate an attorney employed by the administratrix to conduct the settlement of the estate has nothing to do. The complaint made by the plaintiff in this declaration is confined to the abuse and neglect of duty by the defendant's testator in his employment by the administratrix of Hiram Norton's estate as an attorney to conduct the settlement of it. This exception must be overruled.

4. But the exception taken to the order directing judgment to be entered on the first Monday of March, 1911, must be sustained.

An exception can be taken to a ruling of the Supreme Judicial Court or the Superior Court upon any matter of law. R. L. c. 173, § 106. This includes an order of the Superior Court overruling or sustaining a demurrer. *McCallum v. Lambie*, 145 Mass. 234. *McCusker v. Geiger*, 195 Mass. 46, 52, and cases cited. *Kennedy v. Welch*, 196 Mass. 592. Indeed the only way of carrying to the full court the correctness of an order of a single justice of this court overruling or sustaining a demurrer in an action at law was by taking an exception if the single justice did not in his discretion report the question to the full court. *Cowley v. Train*, 124 Mass. 226.

It is provided by R. L. c. 173, § 79, that after exceptions have

been taken and allowed judgment shall not be entered unless they are adjudged immaterial, frivolous or intended for delay. The order for judgment on the first Monday of March, 1911, was wrong. See *McCusker v. Geiger*, 195 Mass. 46, and cases cited; *Mayberry v. Sprague*, 207 Mass. 508.

The entry must be: Exception to order for judgment in March, 1911, sustained; all other exceptions overruled.

So ordered.

V. E. Barnes, for the plaintiff.

J. B. Carroll, W. H. McClintock & J. F. Jennings, for the defendant, submitted a brief.

FRANK E. OWEN vs. FREDERICK G. BUTTON & trustee.

Hampden. September 26, 1911. — October 25, 1911.

224-216
d 244-2380
d 246-2208

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Contract, Performance and breach, Rescission, Implied: common counts. Sale, Rescission. Barter.

In an action of contract the declaration contained a count upon a contract in writing by which the plaintiff agreed to build a house for the defendant and the defendant agreed to provide all material and pay the plaintiff a sum of money named, which the plaintiff sought to recover. It appeared that after the house was partly built the plaintiff was obliged to suspend work on account of illness, and that the plaintiff and the defendant agreed orally upon a modification of the contract as to the remainder of the work, by which the defendant was to hire and pay men to complete the house and was to account to the plaintiff for the amounts so paid in settlement of the contract price. The presiding judge ruled that the plaintiff could not recover upon the count which alleged a breach of the contract in writing. *Held*, that the ruling was correct, as the plaintiff could not recover the contract price by suing upon the contract in writing, which he had not performed, but could recover only upon the contract as modified by the subsequent oral agreement, under which there was to be deducted from the contract price the amounts paid out by the defendant for the completion of the contract work.

In an action of contract the plaintiff cannot recover as an item of an account annexed the value of property delivered by him to the defendant under a contract of barter or exchange which the defendant abandoned after part performance, if the plaintiff has received and retained a part of the property which was to be delivered to him by the defendant under the contract. He can sue for a breach of the contract, but in order to rescind the contract and sue on a *quantum valebat* he must put the defendant in the condition in which he was before the bargain

by returning the property received from the defendant, and he must do this before beginning his action. An offer of the plaintiff made during the trial to return the part of the consideration received by him comes too late.

CONTRACT, with four counts, of which the first count was for \$29.50 lent by the plaintiff to the defendant, and the other counts are described in the opinion. Writ dated December 1, 1908.

In the Superior Court the case was tried before *Crosby*, J. The material facts shown by the evidence are stated in the opinion. At the close of the evidence the plaintiff waived the fourth count. The judge ruled that the plaintiff could not recover on the second count, and also ruled that on the third count, which was upon an account annexed, the plaintiff could not recover for certain items relating to the acquisition by the defendant of a wood yard of the plaintiff under a contract of barter or exchange which is described in the opinion.

The jury returned a verdict for the plaintiff in the sum of \$188.33; and the plaintiff alleged exceptions.

H. A. Buzzell, for the plaintiff.

R. J. Talbot, for the defendant.

RUGG, C. J. This is an action of contract. The second count of the declaration is for the contract price for building a house. The salient facts are that by a written contract the plaintiff agreed to build a house and furnish all the labor therefor for the defendant, and the defendant agreed to provide all material and pay the plaintiff \$600. After the house was partly completed the plaintiff was obliged to suspend work on account of illness. During his sickness the defendant called on him, when, according to the plaintiff's testimony, the defendant "told me that he had a chance to sell this house, and that he could have Mr. Bennett or Mr. Veley finish it. He said, 'I will keep track of all expenses of finishing and you will pay just what it costs me, — no more or no less, — because I can sell the house just as quick as it is done,' he says, 'in fact it is sold to-day.' After talking a little while I told him he could go ahead and do it that way. And he got Mr. Bennett, a man that worked a great deal for me. . . . He told me what Mr. Bennett said he would do this work for, and in thinking it over it would be about as cheap as I could do it myself, — that is, and charge a day's pay for it. . . . He thought Mr. Veley would do it for the same price, and would do it better than

Mr. Bennett. I was in favor of Mr. Bennett's doing it. I never had employed Mr. Veley, though I knew him. He told me what he would do it for. . . . In thinking it over there — of course I was in bed at the time — I figured it up, and I thought it was about the same price it would cost me, — that is, and get a day's pay out of it. So I told him to go ahead and do it. . . . He told me that Myron Wyman would do this inside work, and he would pay him by the day just the same as I had been paying. I told him if he thought he was competent to do that work to go ahead and let him do it. . . . I had let the plumbing and he had this same man do the work for the same price that I was to do it. He would look after this plumbing; he told me he would look after it."

After the plaintiff recovered he went to the house two or three times "to look it over and talk to the men," but he did not give them any directions "how to do the work." The reasonable construction of this conversation is that it effected a modification of the written contract as to the remainder of the work upon the house, such that the defendant was to hire men to complete it, and account with the plaintiff for the amounts so paid in settlement of the contract price. The conversation is not susceptible of the construction that the defendant became the agent of the plaintiff for hiring men to complete the contract. It follows that the plaintiff cannot recover the contract price and leave the defendant to establish by independent means the claim he may have for disbursements to complete the work required to be done by the plaintiff under the contract. He can recover only upon the contract as modified, for the contract price less that which the defendant has paid out for the completion of the contract and has already paid the plaintiff on account. The ruling was correct that the plaintiff could not recover on the theory that he had fully performed the original written contract.

The fourth count of the plaintiff's declaration set forth a sale of a wood business by the plaintiff to the defendant, the consideration for which was the assignment of a note and mortgage and the conveyance of certain real estate and a cash payment with the further allegation of performance by the plaintiff and breach by the defendant in failing to pay the cash and make a

valid conveyance of the real estate. The third count was upon an account annexed, certain items of which were for the same property which constituted the subject of the sale alleged in the fourth count. At the trial the plaintiff waived the fourth count, and elected to go to trial upon the third count.

The evidence was uncontroverted to the effect that the plaintiff had sold and delivered to the defendant the wood business and the property connected therewith, and had received from the defendant as partial consideration a note and mortgage of some third person, and that the plaintiff had retained this note and mortgage and had collected money due upon it, and had not returned or offered to return it to the defendant before bringing suit. As to other items of property and cash alleged to constitute the consideration for the sale, the evidence was conflicting. But upon the showing made by the plaintiff it is plain that he could not recover upon an account annexed for property sold by way of barter or exchange, where he retained a substantial part of the consideration received. If he intended to revoke the contract by reason of the defendant's breach and to seek to recover the value of the property delivered to the defendant on a *quantum valebat*, it was his duty to put the defendant in the condition in which he was before the bargain by first returning to him the consideration he had received. His failure to do this deprives him of the right to sue except for breach of the contract. *Kimball v. Cunningham*, 4 Mass. 502. *Bartlett v. Drake*, 100 Mass. 174, 176. *Marston v. Singapore Rattan Co.* 163 Mass. 296. *Croft v. Wilbar*, 7 Allen, 248. *DeMontague v. Bacharach*, 181 Mass. 256. *O'Shea v. Vaughn*, 201 Mass. 412, 420-424. The plaintiff relies upon *Miller v. Roberts*, 169 Mass. 134, 146, but that case is plainly distinguishable, for in the case at bar no question of the statute of frauds was raised by the pleadings or at the trial, and the defendant appears to have contended that he had fully performed his part of the contract, and the controversy related chiefly to the terms of the contract.

Some reliance is placed upon the offer of the plaintiff during the trial to return the consideration. But the authorities just cited show that the general rule is that the offer to return the consideration must be made in a case of this sort before action is brought. A return may be made after the institution of the

action in instances where the thing returned is as between the parties a mere promise or not property, as for instance a check or note of one of the parties. *Morse v. Woodworth*, 155 Mass. 233, 249. *Illustrated Card & Novelty Co. v. Dolan*, 208 Mass. 53, 55. This is not that exceptional kind of case, but falls within the general rule above stated.

The question as to the validity of the deed of the Connecticut property becomes immaterial.

Exceptions overruled.

MARION P. THOMSON vs. GEORGE F. PENTECOST.

ARTHUR F. STONE vs. SAME.

Franklin. September 19, 1911. — November 1, 1911.

Present: RUGG, C. J., HAMMOND, LORING, & BRALEY, JJ.

Practice, Civil, Parties, Abatement, Conduct of trial: explanatory instruction. Deceit.

Damages, In tort.

The non-joinder of a plaintiff in an action of tort can be taken advantage of only by a plea in abatement.

In an action for damages alleged to have been caused by false and fraudulent representations of the defendant whereby the plaintiff was induced to purchase from the defendant certain live stock and the business of a milk route and to take from the defendant a lease of a dairy farm, where the defendant's liability has been established and the presiding judge properly has instructed the jury that the measure of the damages to which the plaintiff is entitled is the difference between the value of what he received under his contract with the defendant and what that value would have been if the defendant's representations had been true, if the evidence has shown that the relations of the parties, the nature of the misrepresentations and the character of the property to which they related were such that the jury may find the application of the rule as to damages attended with much doubt and uncertainty, it is right for the presiding judge to add an explanatory instruction to the effect that "the fact, that the property sold was of such a character as to make it difficult to ascertain with exactness what its value would have been if it had conformed to the contract, affords no reason for exempting the defendant from any part of the direct consequences of his fraud."

In an action for damages alleged to have been caused by false and fraudulent representations of the defendant, whereby the plaintiff was induced to purchase from the defendant, besides certain live stock and crops, the business of a milk route and to take from the defendant a lease of a dairy farm for a year, where it appears that it was the plaintiff's intention to buy an established and successful business which could not be carried on unless a lease of the defendant's farm

could be obtained, and that this intention was known to the defendant, who falsely and fraudulently represented to the plaintiff that the farm under ordinary conditions could be made to yield a profit of \$2,000 a year, it is right for the presiding judge to refuse to give the ruling "that the measure of damages in this case is simply the difference, if any, between the price of the property and its actual value at the time of the purchase" and instead to give to the jury the correct instruction that the measure of damages is the difference between the value of what the plaintiff received and what that value would have been if the defendant's representations had been true.

TWO ACTIONS OF TORT for damages alleged to have been caused by false and fraudulent representations of the defendant, whereby the plaintiff Thomson was induced to purchase certain live stock from the defendant and with the plaintiff Stone to take a lease from the defendant of a dairy farm in Northfield, called the Maples Dairy, and the plaintiff Stone was induced to give up a profitable business in which he was engaged in order to become one of the lessees and to manage the dairy. Writs dated March 16, 1907.

In the Superior Court the cases first were tried together before *King*, J. The jury returned a verdict for the plaintiff Thomson in the sum of \$1,359.09 and a verdict for the plaintiff Stone in the sum of \$268.77. Exceptions alleged by the defendant were sustained by this court, solely on grounds relating to the measure of damages, in a decision reported in 206 Mass. 505. In that decision this court declared that the right of each plaintiff to a verdict was settled and ought not to be reopened, and that a new trial must be had only upon the question as to the amount of damages in each case.

Such a new trial was had before *Crosby*, J. The course of the trial and the charge of the judge are described sufficiently in the opinion.

The plaintiffs' second request for an instruction to the jury, which is referred to in the opinion as having been given by the judge, was as follows: "The fact, that the property sold was of such a character as to make it difficult to ascertain with exactness what its value would have been if it had conformed to the contract, affords no reason for exempting the defendant from any part of the direct consequences of his fraud."

The defendant asked the judge to make the following rulings:

"1. That the plaintiff Marion Thomson, having agreed that

the property bought by her from the defendant was of full value, and that there was no misrepresentation as to the property itself for which she paid value, the plaintiff is entitled to recover only nominal damages.

"2. That if the jury find that the property which was conveyed by the defendant to the plaintiff Marion Thomson on the ninth day of October, 1906, was worth the sum of \$2,725, that being the price which she paid for the same, then the plaintiff is entitled to recover only nominal damages.

"8. That the measure of damages in this case is simply the difference, if any, between the price of the property and its actual value at the time of the purchase.

"4. That the plaintiff is not entitled to recover anything except nominal damages on account of the loss of alleged profits."

"6. That there is no evidence in the case to warrant the jury in finding that the defendant made any misrepresentations as to the value of the stock, crops, milk route or lease or other property conveyed by the defendant to the plaintiff.

"7. That upon all the evidence the plaintiff Stone is not entitled to recover anything except nominal damages.

"8. That the plaintiff Stone has offered no evidence showing what the actual value of his new employment was, or what it would have been if the defendant's representations had been true.

"9. The plaintiffs Stone and Thomson, on the evidence, are not entitled to recover because any action they may have is a joint action."

The judge refused to make any of these rulings. The jury returned a verdict for the plaintiff Thomson in the sum of \$900 and for the plaintiff Stone in the sum of \$575. The defendant alleged exceptions to the refusal of the judge to make the rulings requested by him and to certain rulings as to the exclusion and admission of evidence, which are referred to in the opinion, and also to the charge of the judge so far as it was inconsistent with the defendant's requests for rulings and to a designated portion of the charge.

W. A. Davenport, for the defendant.

C. N. Stoddard, (*D. Malone* with him,) for the plaintiffs.

BRALEY, J. By our former decision the defendant's liability was determined, but because of error in the instructions a new

trial was ordered on the measure of damages only, and no other question remained open for the defendant to contest. *Pratt v. Boston Heel & Leather Co.* 134 Mass. 300, 302. *Thomson v. Pentecost*, 206 Mass. 505, 513. The cases are again before us upon numerous exceptions which he alleged at the second trial.

It is contended that a verdict for the defendant should have been directed, as, the wrong suffered by the plaintiffs having been joint, they could not sever and bring separate actions. But, if this question were treated as still open, the rule is well settled, that in actions of tort the defendant must plead in abatement the nonjoinder of those whom he contends should have been joined as plaintiffs, and cannot rely on this defence in bar of the action. *May v. Western Union Telegraph Co.* 112 Mass. 90, 93.

Nor were the plaintiffs limited to nominal damages, for reasons sufficiently stated in the former opinion, where the nature and extent of the defendant's liability is considered and decided.

The exceptions also to the instructions that if the assessment of exact damages might be difficult because of the character of the property sold, when considered in reference to the terms of the contract, the difficulty in reaching a just result would afford no reason for relieving the defendant from the consequences of his fraud, are groundless. The relations of the parties and the nature of the misrepresentations were such, when viewed in connection with what the plaintiffs bought or were led to believe they had purchased, that the jury might find the application of the rule which was given as to damages attended with much doubt and perplexity. It was not only competent but necessary for the judge to direct their attention to the duty they were required to perform, by giving the plaintiffs' second request. *Morse v. Hutchins*, 102 Mass. 439, 440.

It was said in *Thomson v. Pentecost*, 206 Mass. 505, 512, that "the damages to which the plaintiffs were severally entitled were to be measured by the difference between the actual value of what they severally received and what that value would have been if the defendant's representations had been true," and throughout the second trial this rule was followed and enforced.

The defendant contended, as shown by his requests, that the measure of damages in an action for deceit is the difference between the value of the property at the time when it is bought and the purchase price. But as was said in *Morse v. Hutchins*, 102 Mass. 439, 440, with a citation of the earlier cases, "in actions for deceit or breach of warranty, the measure of damages is the difference between the actual value of the property at the time of purchase, and its value if the property had been what it was represented or warranted to be." It may be, as remarked by Holmes, J., in *Whiting v. Price*, 172 Mass. 240, 243, that there is a possible conflict between this rule and the measure of damages adopted in other jurisdictions, but it has been defined and followed in *Hedden v. Griffin*, 136 Mass. 229, 231; *Nash v. Minnesota Title Ins. & Trust Co.* 163 Mass. 574, 581; *Kilgore v. Bruce*, 166 Mass. 136, 139; *Whiting v. Price*, 172 Mass. 240, and *Thomson v. Pentecost*, 206 Mass. 505, 512. We are satisfied that in its application such damages are recoverable as will make the plaintiff whole under the circumstances shown by the evidence in the particular case. *Kilgore v. Bruce*, 166 Mass. 136, 139. To apply properly the rule, it was necessary for the jury to be made acquainted with the conditions of sale and the situation of the parties, and to understand what the representations of the defendant were, and whether the plaintiffs had received that which he promised. If the sale had been only of the live stock, with the standing and harvested crops, the value of which was ascertained by an appraisal conceded to have been impartial, there would have been no reasonable cause for complaint. But the sale as finally consummated embraced much more than the purchase of the stock and crops. It also included, as the jury must have found by their verdict at the first trial, and as fully was brought out in evidence at the second trial, the milk route, with a lease of the defendant's farm for the term of one year. The plaintiffs' intention to buy an established and successful business which could not be carried on unless a lease of the farm could be obtained was known to the defendant, and his letter representing its value as a dairy farm, and its products, with an estimate of the profits which could be made, was the inducement which led to the completion of the purchase and the taking of the lease.

The plaintiff Thomson bought and paid for the personal property to be used with the farm, and her brother, the plaintiff Stone, by an arrangement with her was named in the lease as joint lessee. While the jury could find that they intended jointly to engage in dairy farming, the loss to her because of her investment might be greater than that suffered by him, and the damages arising from the defendant's misrepresentations of material facts could be assessed according to the pecuniary loss sustained by each plaintiff. *Baker v. Jewell*, 6 Mass. 461. *Medbury v. Watson*, 6 Met. 246, 257. *Boston & Maine Railroad v. Portland, Saco & Portsmouth Railroad*, 119 Mass. 498. The distinction as to the amount which each plaintiff could recover was clearly pointed out, and the jury were correctly instructed that the plaintiffs, on the assumption that the business had produced a year before a net income of \$2,000, were entitled to the benefit of their bargain respectively, and whatever they lost by reason of these representations not being true they were entitled to recover as damages.

The letters which passed between the parties, the conversations between them, the lease and any statements made by the defendant to the witness Beers as to the terms of sale, or that the plaintiff Thomson was not cognizant that the farm had not been profitable, were relevant and properly admitted as bearing on the value of what the plaintiffs actually received at the time of purchase as compared with what the value would have been if the representations had been true. The testimony from qualified experts as to the value of the defendant's dairy, including the stock, the lease and the milk route for the period of one year, and stating at what sum the property must be capitalized to produce the income represented by the defendant, was admissible for the reasons given in *Thomson v. Pentecost*, 206 Mass. 505, 510, 511. The evidence of Beers, who occupied the farm the year before the sale, that he had lost money, is to be read in connection with his statements previously referred to, that he had frequent conversations with the defendant in which he informed him that not only was the farm unprofitable, but because of the loss entailed in its management he did not care to continue in occupation. It was a question of fact whether the farm under ordinary conditions could be made to yield a

profit of \$2,000 a year, and, if under proper management it never had become remunerative, evidence that no profit had been realized was relevant as to its value.

It is unnecessary to go more at length into the questions raised by the exceptions. We find no error of law in the rulings as to evidence, or in the refusals to give the requests, or in the instructions to the jury. *Thomson v. Pentecost*, 206 Mass. 505.

Exceptions overruled.

SELECTMEN OF NATICK vs. BOSTON AND ALBANY RAILROAD
COMPANY & others.

Suffolk. March 17, 1911. — November 6, 1911.

213-411
222-572

Present: RUGG, C. J., MORTON, HAMMOND, LORING, BRALEY, &
SHELDON, JJ.

Railroad, Abolition of grade crossings, Duty as to repairing bridges. Statute, Construction. Municipal Corporations. Words, "Framework," "Surface."

In a suit in equity by the selectmen of a town against a railroad corporation, to compel the defendant to repair the under floor of a certain bridge over the tracks of the defendant, constructed under an order of commissioners appointed in proceedings for the abolition of a grade crossing, on the ground that the under floor was a part of the "framework" of such bridge and not a part of its "surface" within the meaning of those terms as used in St. 1906, c. 468, Part I § 38, where the plaintiffs excepted to the admission in evidence of expert testimony as to the meaning of the terms "framework" and "surface" of a bridge, but the judge in making his decision, which was set forth in a memorandum, did not make a finding of fact as to the meaning of these words, but ruled that as matter of law the under floor of the bridge in question was a part of the "surface" of the bridge and was not a part of the "framework" which the defendant was bound to keep in repair, this court, in sustaining the ruling of the judge, observed that the rule of law, which under proper conditions allows the admission of extrinsic evidence to explain the technical or peculiar meaning of a word as used in an instrument in writing, never has been applied to the interpretation of the language of a statute.

St. 1906, c. 468, Part I, § 38, provides that, after the completion of the work for the abolition of the crossing of a railroad with a public way at grade, "the expense of maintenance and repair shall be paid for as follows: if the public way crosses the railroad by an overhead bridge, the framework of the bridge and its abutments shall be maintained and kept in repair by the railroad corporation, and the surface of the bridge and its approaches shall be maintained and kept in repair by the city or town in which they are situated." The report of commissioners appointed in proceedings for the abolition of such a grade crossing ordered that "the superstructure of said bridge shall be built of iron or steel,

with hard pine underfloor and spruce plank wearing surface." In the bridge constructed under this order, the main girders, the floor beams and the stringers were of steel. The level of the tops of the floor beams was three inches above that of the tops of the stringers which were placed across them. On the stringers and between the floor beams was laid an under floor of hard pine planks three inches thick, by which the whole level was raised to that of the top of the floor beams. Over all was laid a wearing surface of two inch spruce planks. In a suit in equity brought under St. 1908, c. 552, § 2, by the selectmen of the town in which the bridge was situated against the railroad corporation, to compel the defendant to repair the under floor of the bridge as being a part of its framework, it was *held*, that the under floor was not a part of the "framework" of the bridge but was a part of the "surface" which the town and not the defendant was obliged to maintain and keep in repair.

BILL IN EQUITY, filed in the Superior Court on June 18, 1910, under St. 1908, c. 552, § 2, by the selectmen of the town of Natick to compel the Boston and Albany Railroad Company to repair the hard pine under floor of a bridge over the tracks of the railroad of that corporation at North Main Street in Natick, in compliance with the terms of St. 1906, c. 463, Part I, § 38, relating to the maintenance and repair of bridges constructed under proceedings for the abolition of a grade crossing under that statute.

The case was heard by *Richardson, J.* The facts appeared in evidence which are stated in the opinion. The judge, against the objection and subject to the exception of the plaintiffs, admitted expert testimony as to what is the framework of a bridge and what is the surface of a bridge.

The judge made a memorandum of decision as follows: "Upon all the evidence and the explanations of the plans and the construction of this bridge, and considering the inconvenience of a divided responsibility in respect to the same parts of the floor of the bridge, my impression is, that the word 'framework' in section 38, referred to, was not intended to include the planking or flooring, even if two planks are put on instead of one; that the under planking, so called at this hearing, is not a part of the 'framework.' Whether there shall be two planks instead of one is a matter of flooring, and not a matter of framework. Therefore I think that the town, in such a bridge as I understand is constructed here, has the duty of keeping the flooring, whether it consists of one plank or two, in repair and order." There was another paragraph of the memorandum in regard to

the duty of a defendant street railway corporation, which is not material.

The judge ordered that a decree should be entered in accordance with the opinion expressed in the memorandum. The plaintiffs alleged exceptions to this order and to the admission of the expert testimony referred to above.

The case was argued at the bar in March, 1911, before *Knowlton, C. J., Morton, Hammond, Sheldon, & Rugg, JJ.*, and afterwards was submitted on briefs to all the justices then constituting the court except *De Courcy, J.*

W. R. Bigelow, (M. F. Kennedy with him,) for the plaintiffs.

W. Hudson, (G. P. Furber with him,) for the defendants.

RUGG, C. J. This is a suit in equity brought by the selectmen of Natick under St. 1908, c. 552, § 2. The question presented is the meaning of the words of St. 1906, c. 463, Part I, § 88, as to the apportionment between the railroad and the town of the cost of maintenance of a bridge by which a highway spans the tracks of a railroad, built in pursuance of a grade crossing abolition. The physical facts of importance are that this bridge consists of main girders extending from abutment to abutment, which ultimately bore the entire weight of the bridge; across these were six floor beams; directly supported by these but with their upper plane three inches below the highest level of the floor beams were stringers or "I" beams, twenty-three of which were between each two floor beams. The girders, floor beams and stringers were of steel. On top of the stringers was laid the under floor of hard pine planks three inches in thickness. By these the elevation of the whole was brought even with that of the floor beams. Over all was laid the wearing surface of two inch spruce planks. Additional special flooring for the street railway tracks is not here material. There was testimony which was not contradicted, and appears to have been accepted as true, that the general purpose of the plan of two sets of planks was economy and safety, in that the wearing surface could be replaced as deterioration by use required, while the under floor which served as a general support for the traffic, being not directly exposed, would last much longer. There was also evidence, which does not seem to have been controverted, that the under flooring in bridge construction is always designed to be of

strength sufficient to support the load of travel, while the wearing surface planks do not add strength. While bridges sometimes are built of one layer of planks of greater thickness, the better and prevailing practice seemingly is to use two layers of planks of different thickness and variety of wood. The upper planking in this bridge has worn out and been replaced from time to time by the town. Now the under planking needs to be renewed. The point to be decided is whether the railroad or the town shall bear this expense. The material words of the statute are "the expense of maintenance and repair shall be paid as follows: . . . the framework of the bridge and its abutments shall be maintained and kept in repair by the railroad corporation, and the surface of the bridge and its approaches shall be maintained and kept in repair by the city or town."

There was a hearing before a judge of the Superior Court, who filed a memorandum. Although its phrase is not wholly clear, we understand it to be a ruling of law upon the physical facts above stated, and not a finding of fact, that the under planking is not a part of the "framework." As a general rule, the language of a statute is a matter of law for interpretation by the court, and is not a subject as to which evidence of the meaning of words employed would be competent. We are aware of no instance where the narrow rule permitting explanatory evidence, from those possessing expert knowledge, touching the meaning of words obviously used in a technical or peculiar sense in a written instrument has been extended to statutes. *Brown v. Brown*, 8 Met. 573, 576. *Ford v. Tirrell*, 9 Gray, 401. *Easton v. Smith*, 20 Pick. 150, 156. *Federal Ins. Co. v. Gilmour*, 206 Mass. 203. The opinions of individual legislators who framed the statute would have been inadmissible. *Browne v. Turner*, 174 Mass. 150, 154. *United States v. Trans-Missouri Freight Association*, 166 U. S. 290, 317, 319. But the trial judge does not appear to have proceeded on the theory of such extension of the rule. The physical construction of the bridge being explained, he treated as a question of law what was "framework" to be kept in repair by the railroad and what was "surface" to be repaired by the town. The correctness of his ruling of law appears to be fairly open by the exceptions.

"Framework" as applied to things built or constructed means

that which furnishes form or strength, or both. It is used here as the antithesis of "surface." It is clear that "surface" is not employed in its geometrical sense as signifying a plane. It includes obviously some degree of thickness.

The report of the commissioners provided that "the superstructure of said bridge shall be built of iron or steel, with hard pine underfloor and spruce plank wearing surface." This language seems to indicate that they treated the superstructure of the bridge as consisting of two main features, the iron or steel on the one side and the under floor and wearing surface on the other side. In other words it consisted of the steel framework and the double flooring which was the surface of a continuous roadway. The use of the words "wearing surface" has some tendency to show that the spruce plank constituted only a part of the "surface" mentioned in the statute, while the words "under flooring" likewise tend to indicate a fraction to be united with that which is above in making a single unit. This unit must be the "surface" mentioned in the statute. "Surface" is used in contradistinction to "framework" and is tantamount to flooring when one considers a bridge as a whole, to be kept in repair in part by a railroad and in part by a town. The railroad furnishes the support or "framework" for the road or "surface" which the town is to maintain. If the report of the commissioners had required but one layer of planks five inches in thickness, that plainly would have been all "surface." The fact that two layers, each of thinner planks, were ordered does not affect the substance of the matter, which was in fact the surface of the street as distinguished from the supporting framework.

In the division of the whole structure of a bridge into these two parts, the word "framework" has some tendency to point out that which constitutes the carrying strength of the bridge, while "surface" seems more nearly to relate to that which within the limits of the carrying strength supports the immediate burden of travel. Both layers of planks are needed for this latter purpose.

This interpretation seems more simple, direct and natural, and avoids some troublesome questions of liability which might arise if the maintenance of different layers of plank laid one

upon the other were apportioned to different parties. While the question is a close one, we incline to treat the word "surface" as including all the flooring.

Leary v. Boston Elevated Railway, 180 Mass. 203, does not appear inconsistent with this view, for there the language under discussion was "surface material of streets" in connection with "paving" and "upper planking," thus differing materially from that here construed.

Exceptions overruled.

NORA A. LIVERSIDGE vs. BERKSHIRE STREET RAILWAY
COMPANY.

SAME vs. SAME.

Berkshire. September 12, 1911. — November 28, 1911.

Present: RUGG, C. J., MORTON, HAMMOND, & BRALEY, JJ.

Street Railway. Custom. Carrier, Of passengers.

In actions by an administrator against a street railway corporation for the conscious suffering and death of the plaintiff's intestate, alleged to have been caused by an assault committed by a conductor of the defendant on the plaintiff's intestate in ejecting him from one of the defendant's cars, the plaintiff introduced evidence that the plaintiff's intestate boarded a crowded car of the defendant and stood in the vestibule, saying that there was no room for him inside, whereupon the conductor ordered him to go into the car or to get off, and, stopping the car, repeated this order, and that, when the intestate replied that there was no room inside, the conductor pushed him backward off the steps of the car, causing the injuries. There was uncontradicted evidence on both sides that the plaintiff's intestate was told by the conductor either to go inside the car or to get off. The plaintiff offered to show that at the time of the alleged assault there was a custom which had existed for a long time for passengers to ride in the vestibules of the defendant's cars, that this custom was known to the defendant and that no objection was made to passengers so riding. The judge excluded the evidence. *Held*, that the exclusion was right; that there was nothing in the alleged custom, if it existed, that compelled the defendant to permit passengers to ride in the vestibule, its only effect being to justify passengers in riding in the vestibule in the absence of objection on the part of the person in charge of the car, and that, when a passenger was notified by the conductor to go inside the car or to get off, such a custom became immaterial.

In an action by an administrator against a street railway corporation for the death of the plaintiff's intestate, alleged to have been caused by an assault committed by a conductor of the defendant upon the intestate in ejecting him from one of

the defendant's cars, where there was evidence that the car was crowded and that, when the plaintiff's intestate boarded the car and stood in the vestibule, he was told by the conductor either to go inside the car or to get off, the plaintiff asked for a ruling that, if there was a rule prohibiting persons from riding in the vestibule of a car and the defendant's servants "permitted the car to become so crowded that passengers could not with a reasonable degree of diligence get into the car, and while the car was in that condition stopped for and received the plaintiff's intestate and received fare for his passage, the plaintiff's intestate had a right to ride in the vestibule of said car until he could with a reasonable degree of diligence gain admission inside said car." The judge refused to give the instruction in that form and instructed the jury as follows: "If you find he [the intestate] was a passenger and was told by the conductor to go inside the car or else get off, he was bound to do so if there was a reasonable opportunity for him to get in the car; if he could have got into the car reasonably and he did not want to go into the car, then he was bound to get off if the conductor gave him a reasonable opportunity to alight, for he cannot himself elect to stay upon the vestibule." The jury found that the plaintiff's intestate was not a passenger, and returned a verdict for the plaintiff in a sum which the plaintiff deemed insufficient. On exceptions alleged by the plaintiff, it was said, that the ruling requested was given in substance so far as it properly could be given, and that it could not have been ruled as matter of law, that, if the plaintiff had been received as a passenger, he "had a right to ride in the vestibule of said car until he could with a reasonable degree of diligence gain admission inside said car."

TWO ACTIONS OF TORT, by the administrator of the estate of Roger Liversidge, the first for personal injuries sustained by the plaintiff's intestate, and the second for his death, both alleged to have been caused by an assault committed by a conductor in the employ of the defendant upon the plaintiff's intestate, whereby the intestate was thrown from a car of the defendant in which he was travelling. Writ dated January 19, 1910.

In the Superior Court the cases were tried together before *Fessenden, J.* The evidence is described in the opinion. The offer of proof, which is referred to in the opinion, was an offer "to prove that at the time the plaintiff's intestate received his injuries there was an habitual custom that had long existed for passengers to ride in the vestibule of the defendant's cars on its road; that this custom was known to the defendant; that fares were taken up from the people so riding and no objection made to the same." The judge refused to admit this evidence.

The defendant introduced in evidence a rule contained in a book of rules of the defendant "for the guidance of conductors and motormen." The rule was under the heading "Handling Passengers" and was as follows: "Platform Clear. Conductor

must keep the rear platform and steps clear of passengers whenever there is room inside."

At the close of the evidence the plaintiff asked for the following rulings in each case :

"1. It is for the jury to say whether any rule or regulation offered by the defendant company prohibiting persons from riding in the vestibule or platform of its car, was intended by the defendant company to be enforced as such.

"2. On the question whether any rule or regulation offered by the defendant company prohibiting persons from riding in the vestibule or platform of its car was intended to be enforced as such or had been waived by the company, it is competent for the jury to consider evidence of custom on the part of passengers riding in the vestibule of said car without objection on the part of said defendant company, its servants and agents.

"3. If the jury shall find that there was a rule or regulation on the part of the defendant company forbidding or prohibiting persons from riding in the vestibule of a car, and the defendant company by its servants and agents permitted the car to become so crowded that passengers could not with a reasonable degree of diligence get into the car, and while the car was in that condition stopped for and received the plaintiff's intestate and received fare for his passage, the plaintiff's intestate had a right to ride in the vestibule of said car until he could with a reasonable degree of diligence gain admission inside said car."

The judge refused to make these rulings. Among other instructions the judge instructed the jury as follows :

"Now there is evidence in this case tending to show that there was a rule that the conductors should require people to vacate the rear platform and go inside when there was room. It is a question of his obeying reasonably the requirements, if there was room inside. If he [the intestate] was told to go in or get off the car, then the conductor must give him a reasonable opportunity to alight in safety, because the conductor couldn't, if he was a passenger, the conductor couldn't require him to get off the car while it was in motion.

"There are many things that he has to do, and it is said in this case that there was a rule governing his conduct or directing his conduct under certain circumstances, a rule with

reference to the occupancy of the platform. Now that rule is competent for you to consider in connection with the proper performance of his duties. It's for us to take the rule into account as part of the circumstances of the case, if there was any such rule.

"There is a notice to keep passengers under those circumstances out of the vestibule. You will have that rule before you. I don't understand, gentlemen, this rule requires the conductor to keep passengers out of the vestibule under all circumstances, but it's where there is room for them inside. I do not understand that this rule, although I am not prepared to say that they couldn't pass a rule whereby under all circumstances passengers should be kept from standing permanently in the vestibule, but that's not this case, because so far as the rule goes, it is where there was room inside, but you will have the rule before you, so that it would become important for you to see whether there was room inside or not, and if there was room inside, then, as I said yesterday, it's the duty of the passenger to go in. It's his duty to go in, and if the conductor tells him to go in or else get off the car, it's his duty to get off if he doesn't want to go in. He isn't obliged to go in. He can get off the car, but he can't stay in the vestibule if he is requested not to do so. I instruct you that positively in this case. He needn't stay on the car, but if he does, he should go inside the room. The conductor should give him a reasonable opportunity to alight, under those circumstances, if he elects to get off the car. That's part of the conductor's duty. . . . It becomes important for you to ascertain what was the condition as near as you can, what was the condition inside. It is said on the one hand that the car was crowded and there wasn't opportunity for him to go inside. If that is so, of course he couldn't go inside. He isn't bound to go inside if that is so."

In answer to a question of a juror in regard to whether the plaintiff's intestate was a passenger, the judge said, "If you find he was a passenger and was told by the conductor to go inside the car or else get off, he was bound to do so if there was a reasonable opportunity for him to get in the car; if he could have got into the car reasonably and if he did not want to go into the car, then he was bound to get off if the conductor gave him a

reasonable opportunity to alight, for he cannot himself elect to stay upon the vestibule."

The judge submitted to the jury two issues of fact in each case, as follows:

"First: Was the intestate a passenger on the defendant's car?

"Second: Was the intestate in the exercise of due care?"

The jury in each case answered both questions in the negative, and in each case returned a verdict for the plaintiff, in the first case in the sum of \$750, and in the second case in the sum of \$500. The plaintiff alleged exceptions.

The cases were submitted on briefs.

J. F. Noxon, M. Eisner & J. B. Cummings, for the plaintiff.

H. W. Ely & J. B. Ely, for the defendant.

MORTON, J. These are two actions of tort arising out of an assault committed by a conductor of the defendant on the plaintiff's intestate while ejecting him from one of the defendant's cars. The injuries received by the plaintiff's intestate resulted in his death. One action is for conscious suffering and the other for his death. There was a verdict for the plaintiff in each case with which the plaintiff is dissatisfied, and the cases are here on her exceptions to the rejection of evidence and to the refusal of the presiding judge to give certain rulings that were requested.

The plaintiff introduced evidence tending to show that her intestate boarded the car at the rear and that the car was crowded so that he could not enter it and he remained standing in the vestibule; that the conductor spoke to him and told him he must go into the car or get off and he replied that if the conductor would find him a place he would go in; that the conductor repeated his direction to go into the car or get off once or twice and then stopped the car and again told the plaintiff's intestate to go in and he replied there wasn't room, and the conductor then ejected him by pushing him backward off the steps of the car, thereby causing the injuries complained of. The defendant introduced evidence tending to contradict that of the plaintiff as to some of the circumstances under which the assault occurred though not as to the directions given by the conductor to the intestate to go inside the car. The jury found in answer to two questions submitted to them by the presiding judge that

the intestate was not a passenger and was not in the exercise of due care.

The plaintiff offered to show, as bearing upon the question of her intestate's due care and the negligence of the defendant, that at the time of the alleged assault there was a custom which had existed for a long time for passengers to ride in the vestibules of the defendant's cars, that this custom was known to the defendant and that no objection was made to passengers so riding. The evidence was excluded and the plaintiff excepted. We think that the evidence was rightly excluded. The custom, even if it existed, did not compel the defendant to permit passengers to ride in the vestibule. The only effect of it was to justify passengers in riding in the vestibule in the absence of any objection thereto on the part of the person or persons in charge of the running of the car. Uncontradicted evidence on both sides showed that the plaintiff's intestate was told by the conductor either to go inside of the car or to get off. We do not see, therefore, how the existence of a custom was material. The fact that the plaintiff's intestate was directed by the conductor to go inside or get off distinguishes this case from those relied on by the plaintiff to show that evidence of a custom on the part of passengers to ride in the vestibule or on the platform was admissible.

What we have said disposes, we think, of the first two requests. The first of those was that it was for the jury to say whether a rule of the company which had been introduced in evidence requiring conductors to keep the rear platform and steps clear of passengers when there was room inside was intended to be enforced by the company. The second was that in passing upon the question whether the rule was intended to be enforced evidence of a custom for passengers to ride upon the rear platform without objection was competent for the consideration of the jury. There was nothing to show except the alleged custom that the company had waived the rule. As we have said, the alleged custom did not compel the company to allow passengers to ride in the vestibule or on the rear platform, and when passengers were notified to go inside or get off the car the custom ceased to be of any consequence. We think that these requests were rightly refused.

The third request was given in substance and effect so far as it properly could be given. We do not think that under the rule of the company or otherwise it could be said as matter of law that the plaintiff's intestate, having paid his fare and been received as a passenger, "had a right to ride in the vestibule of said car until he could with a reasonable degree of diligence gain admission inside said car." He was subject to the direction of the conductor even after he had paid his fare and had been received as a passenger, and, if he was requested by the conductor to go inside or get off the car, he was bound to do so, leaving the question, if there was any, of the rightfulness of the conductor's action for future settlement.

The result is that we think that the exceptions should be overruled.

So ordered.

JOHN L. STUART vs. HOLYOKE STREET RAILWAY COMPANY.

Hampden. October 23, 1911. — November 28, 1911.

Present: RUGG, C. J., HAMMOND, BRALEY, & DECOURCY, JJ.

Negligence, In use of highway.

It is not the duty of the proprietor of a "reach wagon," transporting on a public street rails sixty feet in length upon two pair of wheels from forty to fifty feet apart, to have a person or persons in attendance to protect travellers from being struck by the rear wheels, and, in an action by a child three and a half years of age for injuries sustained from being struck by one of the rear wheels of such a vehicle when he had stopped after having walked for about one hundred feet beside it while the horses were walking slowly and the driver was looking forward, the absence of warning to the plaintiff is no evidence of negligence on the part of the defendant.

TORT by a child three and a half years of age, when injured, for injuries sustained at about half past four o'clock on the afternoon of October 27, 1910, from being knocked down on High Street in Holyoke by one of the rear wheels of a long wagon, sometimes called a "reach wagon," consisting of two pair of wheels connected only by the load being transported, which was drawn by horses alleged to have been driven by a servant of the defendant. Writ dated January 4, 1911.

In the Superior Court the case was tried before *Sanderson, J.*

The material facts shown by the plaintiff's evidence are stated in the opinion. At the close of the plaintiff's evidence the judge ordered a verdict for the defendant; and the plaintiff alleged exceptions.

The case was submitted on briefs.

A. L. Green & F. F. Bennett, for the plaintiff.

W. H. Brooks & W. Hamilton, for the defendant.

DECOURCY, J. The plaintiff, a child of three and one half years, wandered from his home to a public street in Holyoke. When first noticed he was walking alongside a "reach wagon," with his hand resting upon some sixty foot rails that were upon the vehicle. The front and rear pair of wheels were from forty to fifty feet apart; and the plaintiff, who was nearer the rear than the front wheels, walked along with the conveyance for about one hundred feet, when he stopped and was struck by the right hand rear wheel. The horses were walking slowly and the driver was looking forward. No other children were around there except some newsboys on the sidewalk.

The plaintiff's contention is that the defendant's failure to have men in attendance upon the conveyance to protect him from being struck by the rear wheels constituted negligence, and that the case should have been submitted to the jury on that issue.

The judge was right in directing a verdict. The public ways are established and maintained for the general convenience of passage and traffic and for the reasonable and equal use of all. They are commonly and necessarily used by wagons of different lengths and for the transportation of large objects, such as machinery, merchandise and building materials. And this general use of the highways for traffic has greatly increased with the extensive application of gas, steam and electricity as motive power for vehicles and with the growth of business. Yet our attention has been called to no case, in all these varied uses of highways, where the courts have held it incumbent upon the person in control of a vehicle to station guards for the purpose of preventing pedestrians from coming in contact with the rear part of the conveyance. As was said by Barker, J., in *Gargan v. West End Street Railway*, 176 Mass. 106: "Vehicles are frequently met with in the streets with appurtenances projecting as far from the rear end of the main portion of the vehicle as

the fender projected in the present instance. So loads of iron rods or pipes, lumber, beams, and other like articles often project to much greater distances behind the vehicles upon which they are. It is not unusual to see two or three wagons, one attached behind the other, drawn through the streets by one team. Yet a traveller who walked into such an obstacle to his passage, supposing that, if he avoided collision with the body of the vehicle to which the team was attached, the way would be clear, would collide with an obstacle which was rightfully in place, and could not recover for his injury."

The argument of the plaintiff as to the perils confronting the traveller on foot must be addressed rather to the Legislature, in whom is the ultimate control of public rights in the highways. Where a particular use of the streets unreasonably endangers travel on foot or by horses in the ordinary manner, the Legislature may be expected to regulate such use. Thus, in this Commonwealth, the operation of motor vehicles is controlled (St. 1909, c. 534), the law of the road provides for the passing of vehicles (R. L. c. 54), the leading of dangerous wild animals is limited (R. L. c. 52, § 16), cities and towns are authorized to make ordinances and by-laws relative to the driving of cattle (R. L. c. 52, § 6), and a recent act (St. 1911, c. 578) requires certain vehicles to carry lights at night.

This is not like the cases arising from the frightening of horses by the transportation of extraordinary objects in the highway, where precautions are necessary in order to enable others with equal rights to travel in the ordinary manner or to pass the object in safety. *Joyce v. Exeter, Hampton & Amesbury Street Railway*, 190 Mass. 304. Nor do we intimate that under other circumstances one using the street may not be under obligation to take special precaution to avoid endangering the lives or property of others rightfully upon the highway. *State v. Kowolski*, 96 Iowa, 346. *Mullen v. Glens Falls*, 11 App. Div. (N. Y.) 275.

In view of our decision that no negligence was shown on the part of those having control of the wagon, it is not necessary to determine whether the plaintiff was a trespasser, nor whether the driver was a servant of the defendant at the time of the accident.

Exceptions overruled.

LARS DAHLGREN, administrator, vs. BOSTON AND MAINE
RAILROAD.

Worcester. October 23, 1911. — November 28, 1911.

Present: RUGG, C. J., HAMMOND, BRALEY, & DECOURCY, JJ.

Way, Public: by prescription. Railroad.

No right of way across the tracks of a railroad corporation on which its trains run can have been acquired by the public by the use of a path which had existed only for ten years when St. 1892, c. 275, was enacted, prohibiting the acquisition by prescription of a right of way across any railroad track or location in use for railroad purposes.

No public right of way by prescription across the tracks of a railroad corporation on which its trains run can be established by tacking to a period of ten years before the enactment of St. 1892, c. 275, during which the public had used a certain path across such tracks, a previous period during which a distinctly different path or road starting from a point more than eighty feet distant had been used to cross the tracks.

TORT, by the administrator of the estate of Maria C. Dahlgren, for causing the death of the plaintiff's intestate while she was crossing the defendant's tracks at Greendale station at Worcester on December 22, 1908, with two counts, the first under St. 1906, c. 463, Part II, § 245, alleging a failure of the defendant to give the signals required by Part II, § 147, and to maintain such a signboard as is required by Part II, §§ 149-151, of the same chapter, and the second under St. 1906, c. 463, Part I, § 63, as amended by St. 1907, c. 392, alleging that the intestate's death was caused by the negligence of the defendant or the unfitness or negligence of its agents or servants while engaged in its business. Writ dated July 17, 1909.

In the Superior Court the case was tried before Aiken, C. J. The facts appeared in evidence which are stated in the opinion. At the close of the evidence the Chief Justice ordered a verdict for the defendant; and the plaintiff alleged exceptions.

V. E. Runo, for the plaintiff.

C. M. Thayer, for the defendant.

DECOURCY, J. The plaintiff's intestate, Maria C. Dahlgren, was killed by a passenger train while walking across the defendant's tracks near Greendale station in Worcester.

The direction of the tracks at this place is substantially north and south. Central Avenue runs in the same general direction and is about two hundred feet west of the tracks. A way known as Dudley Avenue, but not laid out as a public street, extends from Central Avenue easterly to the line of the railroad location near the Greendale station. The station and tracks are six feet higher than this avenue and are reached therefrom by wooden steps. About fifty feet east of the tracks and parallel therewith is West Boylston Street, a public way. The intervening land belongs to the railroad corporation and the tracks are three and seventy-five one hundredths feet higher than the street. On this land and opposite the station was a building known as Howe's store. There is no planking between the rails of the track.

The plaintiff's intestate alighted from an electric car on West Boylston Street, proceeded by the north end of Howe's store and over a spur track and was approaching the northbound track when she was struck by the engine of an express train.

It is not contended that Mrs. Dahlgren was on the railroad property by invitation of the defendant. She was not there for the purpose of transacting any business with the defendant or its agents, but was crossing the roadbed as a short cut to the house of her daughter on Mount Avenue, a street about seven hundred and fifty feet west of Central Avenue and parallel with it. If she was on the railroad track without right the defendant cannot be held liable, as there was no evidence of wilful or reckless misconduct on the part of its servants. *Wright v. Boston & Albany Railroad*, 142 Mass. 296.

The plaintiff's case is based on the contention that the public had acquired, by prescription, the right to cross the defendant's tracks at the point where Mrs. Dahlgren was killed. Upon examination of the evidence we are of opinion that this claim of a public prescriptive right is not established.

The railroad was built about 1848. One Isaac Lamb, the owner of a large farm, by deed dated December 27, 1847, conveyed to the defendant's predecessor in title the original location of the railroad from a point two hundred and eight feet south of where the Greendale station now is to a point seven hundred and fifty feet north, bounded by West Boylston Street on the east

and including the land where the tracks are located. This deed contained the clause: "reserving to the grantor and his heirs and assigns a right to cross said railroad with cattle, teams, carts, etc. at a grade crossing near station 175, which crossing is to be made by said company with convenient approaches etc." Station 175 was somewhere near where the northerly end of the station platform now is. The crossing so reserved was planked and was used by Lamb, whose farm was cultivated on both sides of the railroad. The only house west of the railroad was that of Lamb and this way was little used except by him and by persons going to his house. In 1870 one Dudley bought the Lamb place and some years later began to cut it up into lots. Up to this time there clearly was no such user of this private way as to establish a public prescriptive right. *McCreary v. Boston & Maine Railroad*, 153 Mass. 300. *Sprow v. Boston & Albany Railroad*, 163 Mass. 380. *Aikens v. New York, New Haven, & Hartford Railroad*, 188 Mass. 547.

About 1882 the Greendale station was built and radical changes were made near the old crossing. Teams could no longer approach the track from Dudley Avenue, and the station platform was constructed partly over the old private way. And it is clear from the evidence that those who crossed the railroad location on foot after 1882 used a route other than that previously in use, as they walked directly across the tracks between Howe's store and the station. The Lamb private way crossed the tracks from the west side, near the present station platform, diagonally towards the north. From a point on the electric car track in West Boylston Street directly opposite the northeast corner of Howe's store to the centre of the old Lamb's way is a distance of eighty-three feet. The path used by the plaintiff's intestate was the later one that crossed the tracks from Howe's store to the station. It did not exist previous to 1882, and long before it had been used for the necessary twenty years the St. 1892, c. 275, prohibited the acquisition by prescription of a right of way across any railroad track or location which is in use for railroad purposes. *Simpson v. Boston & Maine Railroad*, 176 Mass. 359. Nor could a prescriptive right in the more recent way be acquired by tacking together two distinct periods of use of the two substantially different routes. *Pope v. Devereux*,

5 Gray, 409. *Hoyt v. Kennedy*, 170 Mass. 54. *Peters v. Little*, 95 Ga. 151. Jones on Easements, § 295.

The evidence would not warrant the jury in finding that the public had acquired a prescriptive right of way at the place where the plaintiff's intestate was killed, and the judge was right in directing a verdict for the defendant.

Exceptions overruled.



JOHN P. BROWN vs. PAUL HANNAGAN & another.

Essex. November 8, 1911. — November 28, 1911.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DECOURCY, JJ.

Bankruptcy.

A debt of a bankrupt created by his misappropriation of money while acting in a fiduciary capacity, which by the bankruptcy act of 1898, § 17, cl. 4, is excepted from the operation of the bankrupt's discharge, does not lose its fiduciary character by acts of the bankrupt in depositing the misappropriated money in a bank in his individual name, giving the beneficial owner a check on the deposit and stopping payment of the check before it can be collected, nor does such debt lose its character by being reduced to judgment in an action on the check, and a suit on such a judgment is not barred by the maker's subsequent discharge in bankruptcy, although the judgment debt was proved as a claim in the bankruptcy proceedings.

BILL IN EQUITY, filed in the Supreme Judicial Court on September 19, 1908, alleging the plaintiff's claim against the defendant Hannagan as stated in the opinion, and further alleging that the defendant Hannagan gave to the plaintiff a check for the amount of such claim but stopped the payment of such check before it could be collected, and that the plaintiff brought an action upon the check and obtained a judgment against the defendant Hannagan for \$1,189.23 damages and \$27.65 costs, that the judgment remained unsatisfied, that subsequently the defendant Hannagan filed a voluntary petition in bankruptcy, that the plaintiff presented his claim for allowance in the bankruptcy proceedings and that it was allowed, but that the plaintiff received no dividend thereon, and that the defendant Hannagan received a discharge in bankruptcy, which the plaintiff alleged

was inoperative to bar the plaintiff's judgment debt under the provisions of the bankruptcy act of 1898, § 17, cl. 4; praying for a decree that the defendant Hannagan owed the plaintiff the amount of such judgment with interest thereon notwithstanding his discharge in bankruptcy.

The clause of the bankruptcy act referred to is as follows: "Sec. 17. Debts not Affected by a Discharge. — A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as . . . (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity."

The case was heard by *Sheldon, J.*, who reported it for determination by the full court of the question whether the plaintiff's judgment was exempted from the operation of the defendant Hannagan's discharge in bankruptcy. If the plaintiff's claim was barred by the discharge, the bill was to be dismissed; otherwise, the case was to stand for further hearing on the other question in issue.

G. Newhall, for the plaintiff.

J. J. Sullivan, for the defendant Hannagan.

DECOURCY, J. The defendant Hannagan (hereinafter called the defendant) was executor of his mother's will, and as such executor collected her life insurance. The plaintiff was named in the policy as a beneficiary to the extent of two fifths. The insurance money was deposited in a national bank by the defendant in his own name; and as the plaintiff's share never was paid to him nor turned over to the estate it must be assumed that it was appropriated by the defendant to his own use. The main question in the case is whether the plaintiff's claim is barred by the defendant's discharge in bankruptcy.

Upon the facts stated in the report the plaintiff's claim, originally at least, was a debt created by the defendant's misappropriation while acting in a fiduciary capacity. *Crisfield v. State*, 55 Md. 192. Such debts are expressly excepted from the operation of the bankrupt's discharge, by clause 4 of § 17 of the bankruptcy act of 1898.

It cannot be successfully contended that the fiduciary character of the debt was affected by the acts of the defendant in depositing this money in his individual name, giving to the

plaintiff a check drawn on that deposit and stopping payment at the bank before the check could be collected. Nor did the proving of the claim in bankruptcy change the relations of the parties to those of creditor and debtor. *Tallant v. Stedman*, 176 Mass. 460. *Madison Township v. Dunkle*, 114 Ind. 262. And under the bankruptcy act the original character of the liability was not lost by being reduced to judgment. *Lee v. Tarplin*, 194 Mass. 47. *Boynton v. Ball*, 121 U. S. 457. *Packer v. Whittier*, 91 Fed. Rep. 511. *Murphy v. Manning*, 134 Mass. 488. *Way v. Brigham*, 138 Mass. 384. *Haggerty v. Badkin*, 2 Buch. 473.

We are of opinion that the plaintiff's judgment was exempted from the operation of the defendant's discharge in bankruptcy. In accordance with the report the case is to stand for further hearing on the other question in issue.

So ordered.

JOHN LEONARD & another vs. DANIEL T. LYON.

Worcester. November 14, 1911. — November 28, 1911.

Present: RUGG, C. J., HAMMOND, SHELDON, & DECOURCY, JJ.

Fence. Fence Viewers. Notice. Evidence, Presumptions and burden of proof.

In an action under R. L. c. 33, § 6, to recover double the value of a part of a partition fence which on an application made by the plaintiff under § 5 of the same chapter had been assigned by the fence viewers to the defendant to build and which the plaintiff had built after the defendant's refusal to do so, it is not necessary that the decree of the fence viewers made under § 6 declaring the value of such part of the fence as ascertained by them should contain a statement that the fence built by the plaintiff had been adjudged sufficient, that requirement being contained in § 4 and relating only to an application made under § 3 of the same chapter.

In an action under R. L. c. 33, § 6, to recover double the value of a part of a partition fence which had been assigned by the fence viewers to the defendant to build and which the plaintiff had built after the defendant's refusal to do so, a recital in the decree of the fence viewers determining the value of such part of the fence, that due notice had been given to the defendant of the hearing for assessing such value, is evidence that such notice was given.

CONTRACT under R. L. c. 33, § 6, to recover \$39.08, being double the amount ascertained by the fence viewers as the value of a part of a partition fence which had been assigned by the

fence viewers to the defendant to build on an application made by the plaintiffs under § 5 of the same chapter and which the plaintiffs had built after the defendant's refusal to do so. Writ in the Central District Court of Worcester dated May 6, 1908.

On appeal to the Superior Court the case was submitted upon an agreed statement of facts to *Aiken*, C. J., who found for the plaintiffs in the sum of \$53.83. From a judgment entered in accordance with this finding the defendant appealed.

The case was submitted on briefs.

J. E. Sullivan & D. F. O'Connell, for the defendant.

P. T. Dolan, for the plaintiffs.

DECOURCY, J. The first application to the fence viewers was made under R. L. c. 33, § 5, and not under § 3 as assumed by the defendant. It appears from the agreed facts that after due notice and a hearing these officials in writing assigned to each party his share of the partition fence, and directed that it should be erected within fifteen days. This assignment was duly entered in the office of the city clerk, and thereupon became binding upon the parties by the express terms of the statute.

It is agreed that after the defendant's refusal to comply with the decree the plaintiffs erected the part of the fence assigned to the defendant in addition to their own share. Under § 6 they became entitled to double the value of his part, and this value was determined by the decree of the fence viewers dated April 1, 1908. The defendant contends that this decree is fatally defective in failing to state that the fence was adjudged sufficient. Such an adjudication is necessary in cases arising under § 3, where the share of the fence which each party is bound to maintain is settled and one of them fails to keep his part in sufficient repair. But it is not required in cases under § 5, where the fence never has been divided between the adjoining owners and the proportion which each ought to maintain is in dispute. *Sears v. Charlemont*, 6 Allen, 437. It is also objected that notice of the time and place of the hearing for assessing the value of the fence does not appear to have been received by the defendant. But the statement in the decree that due notice was given would seem to be sufficient evidence of the fact. *Lamb v. Hicks*, 11 Met. 496.

The proceedings being regular and the decrees valid, judgment must be entered for the plaintiffs in accordance with the stipulation in the agreed statement of facts.

So ordered.

**HAMPARTZOON MINASIAN vs. ROBERT L. OSBORNE & others.
MINAS H. MINASIAN vs. SAME.**

Suffolk. March 20, 1911. — November 29, 1911.

Present: RUGG, C. J., MORTON, HAMMOND, LORING, BRALEY, &
SHELDON, JJ.

Strike. Equity Jurisdiction, To enjoin unlawful strike. Labor.

The lasters employed in a shoe factory, where work is paid for by the piece and there is not sufficient work to keep all of the lasters employed all of the time, lawfully may maintain a strike undertaken in good faith to prevent the proprietor of the factory from permitting a laster in his employ to employ and pay a helper, for whose work the laster is paid by the proprietor in addition to being paid for his own work, the purpose of the strike being to cause the abolition of the system of such an employment of helpers in that factory because it resulted in an unequal distribution of the work of lasting at times when there was not enough work for all the lasters and thus affected their wages.

TWO BILLS IN EQUITY, filed on December 23, 1910, the plaintiff in the first case being the father of the plaintiff in the second case, and the defendants in both cases being representatives and members of the Lasters' Union Local No. 1, an unincorporated association, alleging the facts which are stated in the opinion, and praying for an injunction restraining the defendants from maintaining a strike of the persons who before such strike were employed as lasters by the Randall Adams Company, a corporation, in its boot and shoe factory at Lynn, for the purpose of compelling or inducing the Randall Adams Company to cause Minas H. Minasian, the plaintiff in the second case, who was employed as a laster by the Randall Adams Company, to discharge from his employment as a helper Hampartzoos Minasian, the plaintiff in the first case, also praying for damages and for further relief.

In the Superior Court the cases were heard together by Hitchcock, J., who, with a recital that the pleadings were substantially

the same and the facts identical in the two cases, made a memorandum of findings applicable to both cases, in which he found the facts which are stated in the opinion. The judge made an order that the plaintiffs were severally entitled to an injunction as prayed for and to damages and costs. In each of the cases a final decree was entered in accordance with this order, and in each case the defendants appealed.

The cases were argued at the bar in March, 1911, before *Knowlton, C. J., Morton, Hammond, Braley, & Rugg, JJ.*, and afterwards were submitted on briefs to all the justices then constituting the court except *DeCourcy, J.*

F. W. Mansfield, for the defendants.

J. J. Feely, (*R. Clapp* with him,) for the plaintiffs.

RUGG, C. J. The material facts which give rise to this controversy (as found by the judge of the Superior Court) are that the plaintiff Minas, a skilled laster by trade, had a contract for labor as a laster with the Randall Adams Company, terminable at the will of either. With the consent of his employer, he had in turn employed as helper his father, Hampartsooon, the other plaintiff, who was not able to do all the work of a laster, and who received no wages from the Randall Adams Company and had no relation as servant to it. The work was piece work, and Minas alone received, and was entitled to receive, the compensation for their joint labor. This method of work was known in the craft as "contract" or "cross-handed."

Both of the plaintiffs were, or had been, members of the Lasters' Union, an unincorporated association, of which the defendants are representatives and members. The defendant Osborne, who is the business agent of the Lasters' Union Local No. 1, notified the employer, the Randall Adams Company, that unless the father was discharged the shop's crew would be "pulled out." The father did not work for a day or two, but returned to work after the superintendent of the employer told the son, Minas, to get him and put him to work again. The next day all the other lasters went out on an orderly strike, which was indorsed by the Union. As a consequence, both plaintiffs have lost their employment. The Lasters' Union substantially controls the labor market in the manufacture of shoes, for practically all lasters are members of the Union. The effect of the strike, if continued, will be

to prevent Randall Adams Company from continuing business unless it discharges Minas or compels him to dispense with his assistant.

Here is a plain and tangible injury to the plaintiffs as the proximate result of the acts of the defendants. This gives a cause of action to the plaintiffs unless the defendants have a sufficient justification for their conduct. If they have acted without good cause or excuse, they are liable. *Berry v. Donovan*, 188 Mass. 353, 356. *Quin v. Leathem*, [1901] A. C. 495, 510. *South Wales Miners' Federation v. Glamorgan Coal Co.* [1905] A. C. 239, 244, 246, 251. As was said in *DeMinico v. Craig*, 207 Mass. 593, at 598, "Whether the purpose for which a strike is instituted is or is not a legal justification for it, is a question of law to be decided by the court."

The inquiry must be directed to the character of the justification proffered by the defendants in excuse for their conduct. The purpose of the strike (as found by the Superior Court) was "to compel the plaintiff Minas . . . to cease employing his father to help him and to induce the employer of Minas either to discharge the father or to require Minas to cease employing a helper, or, failing that, to discharge Minas from its employment." But it has been found also that the defendants are not actuated by any ill feeling toward either of the plaintiffs, and that the strike is wholly disconnected with any question of membership in the Union. The basis of the strike is objection to the system known as contract labor or cross-hand work. It follows that the real purpose of the strike is to cause the abolition of that system of work in this shop.

It is not of much consequence whether the object of the strike is stated to be the discharge of the father and son without hostility toward them, but for the reason that they practise a certain system of shop labor, or the abolition of the system of shop labor, with the incidental result that one or both of the plaintiffs may be discharged. In its practical effects upon the rights of the parties, the question of law involved is the same whichever way it is put.

The question presented for decision is whether the abolition of this particular system of shop work is a legal justification for the interference with the rights of these plaintiffs which arises from an orderly strike by fellow employees.

"The objection to the system is," as found by the trial judge, "that where two men worked together, as Minas and his father were doing, they can do more work in a day or a week than any single man working without a helper, and that as a result the men who worked without helpers would not get their fair share of the work that was to be done, and would thus be unable to have a chance to earn as much as they could if there were no helpers employed. The custom in the factory was that when a laster had completed his case of shoes or had nearly completed it so as to be ready for another case, he would put his name upon a list, and it was understood that cases of shoes would be furnished him for his work in the order in which the names stood upon the list. If there was plenty of work so that any laster could have all he could do, the fact that two men working together could do more than he could would not affect the wages he would ordinarily receive; but in case there was a scarcity of work, or not sufficient work to keep all the lasters employed, the laster who had a helper might be able to do more work and other lasters might not be able to obtain work. In that aspect of the case their compensation might be affected by the system of contract labor or cross-hand work." The controversy as presented upon this record is not between employer and employee, but between rival sets of workmen, both of whom were at work in the same shop upon materials of one manufacturer.

This is not a strike which involves any inquiry as to the plaintiffs' habits, conduct or character which might render them unfit or improper shopmates. It is not for the establishment of any system of shop work or rules directed to the curtailment or limitation of production or interference with reasonable industrial advancement. It is not aimed to prevent the highest efficiency of labor or the use of modern or economical machinery. It was not instituted to promote a closed shop or to compel anybody to join or to leave any union, nor primarily to cause the discharge or employment of any person or class of persons. If this results in any instance, it is incidental and not essential to the chief end. It does not go to the extent of interdicting the absolute and unqualified right of the individual to work, if he desires, contrary to the will or rules of a combination.

It is not based upon objections to shop rules established for the reasonable protection of the rights of the employer or promotion of the good order or economical and efficient service of employees. It is not directed against the education of apprentices or those who are trying to learn the trade. It does not appear to be for the establishment or preservation of a monopoly, and this is not indicated by the framework of the bill. It is not directed against piece work as distinguished from day work, nor against any other method of employment where superior skill, dexterity or swiftness secures commensurately higher rewards than inefficiency, carelessness or slothfulness. It does not directly or immediately affect the general convenience, necessities or safety of the public. Its ostensible object is not used as a mask for any ulterior design. The direct and main purpose is to secure a change in a system of work which is asserted to be unjust in its practical operation.

It is contended that this system in its final analysis resulted in an unequal distribution of the work of lasting in slack times and thus affected the wages of the strikers, although it did not so operate when there was work enough to keep all the employees busy all the time. The finding of the Superior Court was in substance to this effect and it is supported by evidence. There is nothing to indicate that the strike was not undertaken in good faith against this system. An honest effort to better conditions of employment by laborers is lawful. The right of the plaintiffs to work upon such terms as they chose is incident to the freedom of the individual. That "right . . . could not be taken away . . . or interfered with by the defendants unless it came into conflict with an equal or superior right of theirs." *DeMinico v. Craig*, 207 Mass. 593, 599. The right of one person to dispose of his labor freely is not superior to the same rights in others. The right of one to work under unsanitary conditions does not go to the extent of preventing others from striking in order to secure a mitigation of these conditions merely because such a strike may interfere with the desire of the first to continue to work under those conditions. The same principle applies where a distribution of work discriminates between men of average capacity and gives an undue preference to one over

another in times when there is a dearth of work. A system of giving out work which, under existing conditions, operates unjustly, is a condition of employment in which all workmen affected by it in a particular shop may have a legal interest. Nor is injury to the employer a reason why a strike to remedy such a condition should be enjoined.

The right of the employer is no more absolute in respect of a condition of employment like this than it is as to hours of labor or rate of wages. It is not a subject as to which he is entitled to special protection against an orderly and otherwise lawful strike. *Pickett v. Walsh*, 192 Mass. 572. The conduct of these defendants, although directly affecting to their detriment the labor habits of the plaintiffs, appears to have sufficient justification in the fact that it is of a kind and for a purpose, which has a direct relation to the benefits of a more uniform distribution of work, and thus of wages among equally skilled or competent workmen during dull seasons. This was the object which the defendants were trying to obtain.

While the plaintiffs' contractual rights to labor, although terminable at will, were entitled to protection against wanton interference (*Citizens Loan Association v. Boston & Maine Railroad*, 196 Mass. 528, and cases cited), they were not so assured or valuable in their nature as are valid contracts for continued service for a definite period. It may well be that a stronger reason might be needed to justify interference with such contracts than with those here in question. We do not go beyond what is necessary to this decision.

The decision of this case depends upon a somewhat narrow interpretation of the findings of the trial court. Construing them as we do, this seems to be a clash of equal rights between fellow laborers, where each could use any lawful means to enforce those rights. No question is presented as to the unlawfulness of the means employed. This is not a case in its facts like those presented for adjudication in *Plant v. Woods*, 176 Mass. 492; *Vegelahn v. Guntner*, 167 Mass. 92; *Walker v. Cronin*, 107 Mass. 555; *Carew v. Rutherford*, 106 Mass. 1; *Sherry v. Perkins*, 147 Mass. 212; *Berry v. Donovan*, 188 Mass. 353; *Reynolds v. Davis*, 198 Mass. 294; *L. D. Willcutt & Sons Co. v. Driscoll*, 200 Mass. 110; *DeMinico v. Craig*, 207

Mass. 598; *Folsom v. Lewis*, 208 Mass. 386; but it comes within principles recognized and stated in several of those cases and applied in *Pickett v. Walsh*, 192 Mass. 572, at 579 *et seq.* In the opinion of a majority of the court the entry in each case must be

Decree reversed; bill dismissed.

CLIFTON L. BREMER, trustee, *vs.* MOSES WILLIAMS, JR.,
& another, trustees.

Suffolk. March 31, 1911. — November 29, 1911.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, SHELDON, &
DeCOURCY, JJ.

Equity Jurisdiction, To compel restitution of unjust enrichment. *Unjust Enrichment. Limitations, Statute of.*

Where a person, who is the sole trustee of two separate estates, pays certain taxes due from one of the estates with money embezzled by him from the other estate, a new trustee of the estate from which the money was embezzled may maintain a suit in equity to recover its amount from a new trustee of the estate which was unjustly enriched by having its debt for taxes thus discharged with the money of the plaintiff.

In a suit in equity by a trustee of an estate against the trustee of another estate to recover an amount of money embezzled by a predecessor of the plaintiff as trustee from the trust estate and paid by him in discharge of a debt for taxes, which was owed by the estate of which the defendant is trustee, at a time when the same dishonest person was the sole trustee of each of the two estates, where the defendant sets up the statute of limitations, the period, during which the dishonest person who made the payment was the trustee of both estates before his dishonesty was discovered, is to be deducted from the six year period of limitation, which begins to run only when there is some one by whom and a different person against whom the claim can be enforced.

BILL IN EQUITY, filed in the Supreme Judicial Court on November 21, 1910, and amended on February 14 and March 17, 1911. The bill, as substituted by the second amendment, is described in the opinion, where also the grounds of the defendants' demurrer are stated.

The case came on to be heard before *Loring, J.*, on an agreement of the plaintiff to abide by the bill substituted by his second amendment and to have the bill dismissed if the demurrer was

sustained. At the request of both parties the justice reserved the case for determination by the full court.

The case was submitted on briefs at the sitting of the court in March, 1911, to *Knowlton, C. J., Morton, Hammond, Braley, & Rugg, JJ.*, and afterwards was submitted on briefs to all the justices then constituting the court except *Loring, J.*

C. L. Bremer, trustee, pro se.

F. W. Grinnell, K. Howes & J. M. Maguire, for the defendants.

RUGG, C. J. This is a suit in equity brought on November 21, 1910, by trustees under the will of Francis W. Sayles against trustees under the will of Thomas Haviland. Its purpose is to recover \$886.60 paid from moneys of the Sayles Trust on July 15, 1902, by Charles F. Berry, who was then the sole trustee under each will, for taxes due from the Haviland trust. Berry was an embezzler from several estates of which he was trustee. His wrongdoing was not discovered until March, 1905. But it is alleged in the bill that the plaintiffs did not know of the fraudulent use of the money of the Sayles trust for the taxes of the Haviland trust until late in the year 1906. The defendants demur on the grounds of lack of equity, the statute of limitations, and laches.

1. The bill is framed in substance upon *Newell v. Hadley*, 206 Mass. 335, and avoids the ground upon which *Craft v. South Boston Railroad*, 150 Mass. 207, was decided. The facts of the present case are indistinguishable in their essence from those on which in *Newell v. Hadley* relief in equity was given. That case was decided after great consideration, and the principle there established must be taken to be the law of this Commonwealth. That principle is that where a trustee of several estates steals money from one, with which to pay the debts of another, the latter, having been unjustly enriched at the expense of the former, may be required in equity to make restitution. On the authority of *Newell v. Hadley* the bill is not demurrable for want of equity.

2. It is plain that the liability of the Haviland trust to the Sayles trust grows out of an implied or constructive obligation, and does not rest upon an express trust. To such an obligation the statute of limitations is a bar in equity as well as at law.

Farnam v. Brooks, 9 Pick. 212. It is an underlying principle in the application of the statute of limitations that before it can begin to run there must be some one in existence by whom, and a different person against whom, the claim may be enforced. The statute implies that such persons are in being, and, if they are not, there is no room for its operation. It is the general rule that where one person represents both sides of conflicting claims the statute does not run. *Burrell v. Egremont*, 7 Beav. 205, 235. *Topham v. Booth*, 35 Ch. D. 607, 611. *In re Hawes*, 62 L. J. Ch. 463. *Lister v. Pickford*, 34 L. J. Ch. (N. S.) 582. *Mills v. Borthwick*, 35 L. J. Ch. 31. *Gray v. Quicksilver Mining Co.* 68 Fed. Rep. 677. See *East Stonehouse Urban District Council v. Willoughby Brothers*, [1902] 2 K. B. 318, 333-335. Berry represented both estates from 1902 to 1905. The beneficiaries under the trusts during this period could not have instituted proceedings in the name of the estates. Berry held the legal title to the several estates, and was the only person who could represent them. It is perhaps legally possible that Berry might have brought a suit in equity seeking to have the results of his thefts apportioned among the estates he had defrauded. *Eastman v. Wright*, 6 Pick. 316. *Wall v. Old Colony Trust Co.* 174 Mass. 340, and cases cited. *Homer v. Wood*, 11 Cush. 62. But as a practical proposition, legal or equitable rights ought not to be predicated upon the theoretical possibility that an embezzler before his detection may seek a court of equity for the adjustment among his victims of the frauds he has perpetrated. Having regard to the characteristics of human nature, such a proceeding is almost, if not quite, inconceivable. It is not a substantial basis upon which to start the running of the statute of limitations. The present suit, having been commenced within six years after the discovery of the embezzlements of Berry, in the opinion of a majority of the court, is not barred.

3. As the statute of limitations is not a defense, there is no occasion for invoking the doctrine of laches. It does not appear on the face of the bill.

Demurrer overruled.

CLARENCE M. SMITH vs. COMMONWEALTH.

Berkshire. September 12, 1911. — November 29, 1911.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, SHELDON, & DE COURCY, JJ.

Damages, For property taken under statutory authority. Greylock State Reservation. Practice, Civil, Exceptions.

At the trial of a petition to recover compensation for a large tract of land, chiefly covered with wood, on Greylock mountain taken under St. 1898, c. 543, for the Greylock State Reservation, the principal elements of value in controversy were the quality and quantity of the standing wood and timber and the ease and expense of marketing it as lumber. It appeared that a stream ran through the land called Hopper Brook. A civil engineer, not shown to be an expert on land values, who was called as a witness by the respondent, testified on cross-examination that the water from this brook could be conveyed to Williamstown and stated the area and watershed of the brook and that a part of it was precipitous with a quick flowage. There was no other evidence tending to show that the market value of the petitioner's land was affected by the presence of the brook. The presiding judge ordered that this evidence be stricken out for the reason that a full inquiry into the adaptability of the brook for a water supply would involve matters of which there could be no satisfactory proof and would be in substance only conjecture. *Held*, that the ruling, although rather broad in its terms, must be interpreted with reference to the evidence to which it was directed and the stage of the trial at which it was made, and that so interpreted it was a proper exercise of judicial discretion within the principles established by *Sargent v. Merrimac*, 196 Mass. 171.

At the trial of a petition to recover compensation for a large tract of land, chiefly covered with wood, on Greylock mountain taken under St. 1898, c. 543, for the Greylock State Reservation, the principal elements of value in controversy were the quality and quantity of the standing wood and timber and the ease and expense of marketing it as lumber. It appeared that a stream ran through the land called Hopper Brook. In regard to considering the brook as an element of value the presiding judge instructed the jury that its availability as a source of water supply "should be entirely disregarded" and that the brook "is a feature which you have a right to consider if you think it throws some light upon the question of value, on the theory that if there was not a brook there the soil would not be as fertile as it is. You have a right to consider that as one of the features but you have a right to consider it to no other extent, not for any possible use to which the brook might be put." There was nothing in the record tending to show that any purchaser would be likely to give an additional price for the land because of the possibility that the brook might be available for a water supply and there was no offer to show that any enhancement of market value arose from this cause. There was nothing to indicate that the town of Williamstown, by which it was contended that the water could be used, did not own already a source of water supply ample for future needs. *Held*, that, although the instructions given were

not accurate statements of law, it did not appear that they were of such a character as to afford reasonable apprehension that the petitioner had suffered harm and thus to require this court to sustain an exception to them.

On a petition to recover compensation for land taken under a statute for a public reservation, the petitioner is not entitled to recover any increase in the value of his land which was due to the fact that the land was known to be within the area designated for the reservation and was certain to be taken for it.

RUGG, C. J. This is a petition * to recover compensation for a large tract of land on Greylock mountain chiefly covered with wood taken under St. 1898, c. 548, for the Greylock State Reservation, a mountain park in the county of Berkshire. Flowing through the land was a stream called Hopper Brook.

1. Apparently the principal element of value in controversy at the trial related to the quality and quantity of standing wood and timber, and the ease and expense of marketing it as lumber. No evidence was shown to have been offered by the petitioner as a part of his case touching the use of Hopper Brook as a water supply, but a civil engineer called by the respondent as a witness (who did not qualify as an expert on land values) testified on cross-examination that the water could be conveyed by gravity to Williamstown, and stated the area of the watershed of the brook, and that part of it was precipitous with a quick flowage. But he gave no definite evidence as to the yield or quality of the brook for a water supply or the suitability of any land for a reservoir, nor was anything said about the present or prospective need of any town for such a water supply as this source afforded, or the other elements essential to an intelligent consideration whether the market value of the petitioner's land was affected by the presence of the brook. The presiding judge directed that this evidence be stricken out, for the reason that a full inquiry into the adaptability of the brook for a water supply would involve matters of which there could be no satisfactory proof, and would be in substance only conjecture. This ruling was well within the principles discussed at length and established in the recent case of *Sargent v. Merrimac*, 196 Mass. 171, which need not be repeated. See also *Maynard v. Northampton*, 157 Mass. 218; *Lakeside Manuf. Co. v. Worcester*, 186 Mass. 552. This is in

* The petition was filed on February 28, 1909. The case was tried before Lawton, J. The jury assessed damages in the sum of \$4,024.18; and the petitioner alleged exceptions.

accord also with the decision in *Fales v. Easthampton*, 162 Mass. 422, 426. The reception of evidence of this sort is largely within the discretion of the trial judge, which will not be revised unless plainly wrong. The ruling, although rather broad in terms, must be read in the light of the evidence to which it was directed and the stage of the trial at which it was made. So considered, it does not appear that the judicial discretion was unwisely exercised or that there was error respecting it in any other regard.

2. Touching the brook as an element of value in the real estate, the jury were instructed that its availability as a source of water supply "should be entirely disregarded" and that the brook "is a feature which you have a right to consider if you think it throws some light upon the question of value, on the theory that if there was not a brook there the soil would not be as fertile as it is. You have a right to consider that as one of the features but you have a right to consider it to no other extent, not for any possible use to which the brook might be put." Considered abstractly, it is plain that this does not state the law. One whose land is taken by eminent domain is entitled to be compensated in money for the fair value in the market of that of which he has been deprived. In ascertaining what that value is, all the uses to which the property is reasonably adapted may be considered. If it is so exceptionally fitted for a municipal water supply and the necessity for such use is so imminent as to add something to its present value in the minds of buyers, that element may be considered. But witnesses and jurors should not be permitted to enter the realm of speculation and swell damages beyond a present cash value under fair conditions of sale by fantastic visions as to future exigencies of growing communities. It is only in those rare instances, when property is of such a nature or so situated or improved that its real value for actual use cannot be ascertained by reference to market value, that the standard of special value may be resorted to. These principles have been stated many times, and are not now open to discussion. *Lawrence v. Boston*, 119 Mass. 126. *Moulton v. Newburyport Water Co.* 137 Mass. 163. *Sargent v. Merrimac*, 196 Mass. 171. *Beale v. Boston*, 166 Mass. 58. *Boom Co. v. Patterson*, 98 U. S. 403. *In re Gough & Aspatria, Sillith & District Joint Water Board*, [1904] 1 K. B. 417. *In re Lucas & Chesterfield Gas & Water Board*, [1909] 1 K. B. 16.

But, although the instructions given were not in accordance with what has been said, it does not follow that the exceptions must be sustained. The petitioner must show that the instructions were not adapted to the evidence or were of such character as to afford reasonable apprehension that he has suffered harm. As applied concretely to this case, it does not appear that any harmful error has been committed. The record is bare of any intimation that any purchaser would be likely to give an additional price because of the possibility that the brook might be available for a water supply. There was no offer to show that any enhancement of market value arose from this cause. There is nothing to indicate that Williamstown did not already own a source of water supply ample for future needs, and the petitioner had closed his case without making any assertion of this kind. Although the jury took a view, this aspect of value, which must include necessity for use in the reasonably near future, is not one which would be commonly obvious on such an inspection, and it does not appear to have been in this instance. Therefore, this seems to be a case where the judge was justified in ruling that the jury should not consider this element of value because there was nothing upon which to base any judgment as to its effect upon the market price of the land. This was the import of the portion of the charge to which exception was taken. The distinction between this ground of decision and that touching the testimony of the civil engineer heretofore discussed is clear. Considerations affecting market value in the minds of those familiar with such values are different from technical testimony of scientific facts or opinions which may have so remote a connection with value as to be admitted or excluded within the discretion of the trial court. An attempt has been made to sustain the exception on the ground that the brook was useful for power purposes, and hence gave an increment of value to the land. But there is nothing in the record which indicates that there was any evidence of this or that the view disclosed any opportunity for its practical use. Hence in the opinion of a majority of the court no error is shown. In other respects the charge was full and fair, and the petitioner's right to compensation was amply protected.

8. The instruction, to the effect that the value of the land was

not to be enhanced by reason of the fact that it was known to be within the area designed for the reservation and was certain to be taken for it, was correct. The compensation, to which an owner of land taken by eminent domain is entitled, is its fair value in the market for beneficial use. If it is in the neighborhood of, but not included within the limits of a public improvement, its value for use in connection therewith may be enhanced, but if it is to be taken for the improvement, it can have, in the nature of things, no increase of scope for valuable use in private ownership. The certainty of a right to a petition for damages for its appropriation by eminent domain is not a valuable use of land. *May v. Boston*, 158 Mass. 21. *Benton v. Brookline*, 151 Mass. 250. Moreover, there does not appear to have been any evidence to which the ruling was applicable, and hence the petitioner can have suffered no harm.

Exceptions overruled.

The case was submitted on briefs at the sitting of the court in September, 1911, and afterwards was submitted on briefs to all the justices except *Loring, J.*

J. F. Noxon & M. Eisner, for the petitioner.

J. M. Swift, Attorney General, & *A. Marshall*, Assistant Attorney General, for the Commonwealth.

**BAXTER D. WHITNEY vs. CHESHIRE RAILROAD COMPANY
& another.**

Worcester. October 3, 1911. — November 29, 1911.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DECOURCY, JJ. 221-2586

Easement, Contingent. Equity Jurisdiction, Specific performance. Laches. Contract, Performance and breach.

A conveyance to a railroad corporation of a strip of land to be used for the construction and maintenance of its railroad thereon, reserving to the grantor certain water rights, privileges and easements and also the right of carrying water from the grantor's mill pond through a canal across the railroad embankment, if such a canal shall be constructed by the railroad corporation, in accordance with the agreement between the parties, upon the request of the grantor and the payment

of a certain sum of money and the doing of certain acts by him, reserves no easement of a right to carry water through the canal except upon the contingency of such a canal being constructed.

In a suit in equity against a railroad corporation to enforce the specific performance of a covenant of the defendant to construct a canal or culvert through an embankment of the defendant's railroad, to connect with a mill pond of the plaintiff, within six months after being requested to do so by the plaintiff "at any suitable and proper season of the year and being paid by him or his heirs or assigns the sum of thirty dollars," provided that the plaintiff should draw down the water of the pond so as to admit of the work being done conveniently and should excavate earth and gravel for such canal and protect its sides at his own expense, the plaintiff must show that an obligation on the part of the defendant to construct the canal was created by a request of the plaintiff in accordance with the terms of the contract made within a reasonable time, and, if it appears that the first request by the plaintiff for the construction of the canal was made thirty-eight years after the making of the covenant, and that in the meantime the circumstances in regard to the property had changed, and if it further appears that the plaintiff's bill was filed five and a half years after the defendant's refusal to construct the canal and that there was great delay in the prosecution of the bill, the plaintiff has been guilty of such unreasonable delay in making his request for performance and in bringing his bill that he is entitled to no relief.

BILL IN EQUITY, filed in the Supreme Judicial Court on July 13, 1893, and amended by leave of court on September 24, 1910, to enforce specifically a certain agreement, described in the opinion, made on October 15, 1849, by the defendant Cheshire Railroad Company with the plaintiff Baxter D. Whitney.

The defendants' answers were filed on September 19, 1893. It was stated in the report to the full court, that "about 1902, on the calling of the docket, the matter was again called to the attention of the plaintiff's present counsel, and they, after correspondence with the defendant's counsel and the plaintiff, moved orally that the case be allowed to stand, the defendants' counsel neither assenting nor objecting; thereupon the court directed that the case should stand. In 1906, in the absence of both counsel at the calling of the docket, the case was stricken from the docket by order of the court. April 13, 1909, the case was restored to the docket at the request of the plaintiff and with the consent of the defendant." On January 19, 1910, William M. Whitney filed a motion, alleging that he had acquired the interests of Baxter D. Whitney in the premises referred to in the indenture annexed to the bill and praying to be allowed to appear in and prosecute the case as a party plaintiff. On September 24, 1910, the motion was granted by the allowance of

the amendment to the bill referred to above. The other material facts are stated in the opinion.

The case came on to be heard before *Rugg, J.*, who reserved it for determination by the full court upon the bill as amended, the answers, the deposition of Baxter D. Whitney and the facts found and reported by the justice, such decree to be entered as equity might require.

T. H. Gage, (*F. F. Dresser* with him,) for the plaintiff.

C. M. Thayer, (*A. H. Bullock* with him,) for the defendants.

SHELDON, J. The bill is brought to secure specific performance of a covenant of the first named defendant contained in an indenture executed in October, 1849, between the plaintiff and that defendant. By that indenture the plaintiff, in consideration of "the agreement" thereafter contained on the part of the railroad company and of \$1 acknowledged to have been paid to him, conveyed to the company a strip of land therein described, to be used by the company for the construction and maintenance of its railroad thereon. He therein reserved to himself in fee certain water rights, privileges and easements, some of which are stated in *Whitney v. Fitchburg Railroad*, 178 Mass. 559, and which included "also the right of carrying water from" the grantor's mill pond "through a canal, if one shall be constructed as is hereafter agreed on the part of" the railroad company, "and finished and completed as is hereafter agreed on the part" of the grantor, "without hindrance or obstruction by said company." The "agreement" of the company, which was in large part at least the consideration for the conveyance, contains, first, a covenant with the grantor, his heirs and assigns, "that he and they shall have a right to use and enjoy the rights and privileges hereinbefore reserved to him and them;" secondly, certain stipulations to provide for the contingency of the railroad and embankment being carried off or destroyed; and thirdly, the covenant now sought to be specifically enforced, which is as follows:

"And the party of the second part [the railroad company] further agree that upon being requested by the party of the first part [the grantor] at any suitable and proper season of the year and being paid by him or his heirs or assigns the sum of thirty dollars they will within six months thereafter construct a canal

through or across the railroad near the southeasterly end of said dam, of the width of twenty feet and to the depth of seven feet below" a fixed point, "and to construct suitable and sufficient stone abutments therefor, provided the party of the first part shall draw down the water in said pond so as to admit of said work being done conveniently and shall excavate and remove the earth and gravel for said canal at his own expense, he to use so much thereof as may not be needed to back up and complete the abutments of said canal in such manner as he may see fit, the party of the first part being also to put in at each side of said canal proper spillings to protect the embankment or dam, at his own expense and repair the same when necessary."

In 1852, the same parties made another agreement, providing for a change in the location and construction of the embankment and dam, by which the location of the dam was moved about eighty-five feet, but which is not material to this case.

This canal or culvert when constructed was to be for the benefit of Whitney's other land, and the water rights and easements were to be appurtenant to such land. It was intended to give to such other land a privilege or easement over the land of the railroad company, upon which its railroad was to be laid. But it was not a right or easement which was created and brought into actual existence by the covenant itself. The stipulation was not that Whitney was now to have this right for the benefit of his other land. It was simply that upon his future demand and compliance with certain conditions the railroad company should construct the canal, and that then, but only then, the right to the easement should become vested in himself and his heirs. It is for this reason that the reservation in the grant does not purport to be a reservation of a right, privilege or easement springing at once into life and to be exercised whenever he should choose to exercise it, like the other reservations made by him, but it is made conditional upon a canal being afterwards constructed by the railroad company. It might never be constructed; and in that case the contemplated privilege or easement never would come into existence, and the contingent reservation would remain a mere nullity. Whether the easement ever would come into existence would depend upon an act to be done by himself, his request to the railroad company and his payment of the sum

of \$30. In this respect the case resembles *Williams v. Hart*, 116 Mass. 513. In that case land had been conveyed in 1853 to a railroad company for the construction of a railroad thereon, subject to the condition that the company should furnish to the grantor two crossings over the land conveyed and the railroad to be built thereon, one at grade and the other by a bridge, at spots to be afterwards designated by the grantor. It was alleged in the bill as amended and of course was admitted by the demurrer that these crossings were intended to provide passages across the railroad for the benefit and improvement of the grantor's remaining land on either side of the land conveyed. The railroad was built in 1855. The grantor owned the adjoining lands until his death in 1864, and the plaintiff was his heir and had since been in possession thereof. The grantor never had designated the spots where the crossings were to be constructed; but after his decease the plaintiff designated the spot for a bridge and requested that it be constructed. At what time this was done did not more definitely appear; but the bill was brought in 1873. In that case, as in this, as appears by the copies of the original papers on file, the crossings and the bridge when constructed were to be forever maintained by the railroad company for the benefit of the grantor, his heirs and assigns; and the main difference between that case and the one now before us is that there was not in that case, as there is here, an express covenant by the railroad company to do the act stipulated for, but merely the simple promise implied by law from its acceptance of the deed. *Kennedy v. Owen*, 136 Mass. 199. In view of the rule that equity will compel purchasers with notice to observe stipulations affecting the use of land inserted in a deed, either by way of condition, covenant or otherwise, for the benefit of adjoining land of the grantor, this distinction may not be material. At any rate it was not adverted to in the opinion of the court; but the bill seeking to compel the defendant to construct a bridge as contracted for, was dismissed upon the sole ground that the designation of the spot for the bridge was not made within a reasonable time. The court said: "Where there is a condition to do a thing upon the performance of an act by the grantor, which is secret and lies within his own breast, the performance is excused till the grantor gives notice of the act." And the delay for nine

years to give that notice was held to be unreasonable. A like rule must be applied here.

In this case, the agreement of the railroad company was made on October 15, 1849; Whitney's request, with the accompanying offer of performance on his part, was made on December 28, 1887, — a delay of more than thirty-eight years. The agreement fixed no time within which the request was to be made; it was simply to be made "at any suitable and proper season of the year." No sufficient cause for delay is shown; none can be found in the evidence reported. The rule has been laid down that where a demand is necessary to fix the legal rights of a party and give a complete cause of action, the demand ordinarily must be made within the time limited for bringing an action at law. *Codman v. Rogers*, 10 Pick. 112, 120. *Phillips v. Rogers*, 12 Met. 405, 412. *Western Union Telegraph Co. v. Caldwell*, 141 Mass. 489, 494. *Campbell v. Whoriskey*, 170 Mass. 63, 65. *High v. Commissioners of Shelby County*, 92 Ind. 580, 588, citing *Codman v. Rogers*, *ubi supra*, and many other cases to the same effect.

It is contended for the plaintiff that this doctrine is not to be applied where, as here, something more than a bare request or demand is necessary; and it has been intimated by this court that that might be so in an action at law. *Shaw v. Silloway*, 145 Mass. 503, 507, 508. *Downer v. Squire*, 186 Mass. 189, 201. *Cromwell v. Norton*, 193 Mass. 291. But the case of *Williams v. Hart*, 116 Mass. 513, already referred to, is decisive against that contention here. There, also, besides making his request, the plaintiff had a further act to do, by fixing and pointing out the exact spot at which he desired the bridge to be constructed. The language of the court in that case is equally applicable here: "The particular act which the grantor here undertook to do, and which it was necessary he should do, to render the obligation to build the bridge complete on the part of the grantee, depended solely upon himself; he could select his own mode and time for carrying out his agreement; no time being limited, the law implies an agreement to do it within a reasonable time under the circumstances." *Atwood v. Cobb*, 16 Pick. 227, 231. *Gardner v. Corey*, 11 Gray, 30. *Ford v. Cotesworth*, L. R. 4 Q. B. 127, 133. It would have been difficult for any one to

select in advance words more appropriate to the circumstances of this case.

It has been contended that the defendant's agreement to build a canal upon its own land for the benefit of Whitney's adjoining land and in aid of the easements reserved for that land was a covenant running with the land. *Morse v. Aldrich*, 19 Pick. 449. *Richardson v. Tobey*, 121 Mass. 457. *Norcross v. James*, 140 Mass. 188, 191. *King v. Wight*, 155 Mass. 444. *Whittenton Manuf. Co. v. Staples*, 164 Mass. 319. *Peters v. Stone*, 193 Mass. 179. Accordingly it is argued that the obligation of the covenant is not impaired by the mere omission of performance for more than twenty years without its having been released or extinguished. *Bronson v. Coffin*, 108 Mass. 175, 188. But that was the case of an actually existing and vested right in the nature of an easement, created by grant, of which mere non-user, without more, does not conclusively show an abandonment. *Barnes v. Lloyd*, 112 Mass. 224. *Butterfield v. Reed*, 160 Mass. 861, 869. *Clinton Gas Light Co. v. Fuller*, 170 Mass. 82, 90. *Gloucester Water Supply Co. v. Gloucester*, 179 Mass. 365, 379. *New England Structural Co. v. Everett Distilling Co.* 189 Mass. 145, 153. As has been already pointed out, we have here merely an executory agreement for the creation in the future, upon the doing of an act by Whitney, of a right and interest which will only then come into being. This contention cannot avail the plaintiff. It was actually existing rights and easements that were protected and enforced in *Whitney v. Fitchburg Railroad*, 178 Mass. 559.

Nor can it be said that the plaintiff's delay is not accompanied by such a change of circumstances as to affect injuriously the rights of the railroad company if specific performance were now enforced. Whitney himself in 1874 brought about a material change by his deed to the Ware River Railroad Company. He conveyed to that company the right to maintain and operate a railroad over a part of his land; and it has built and operated a railroad thereon in such a location that the canal called for now must go under the tracks of both railroads. This would involve not only some additional expense, but increased difficulty of construction and risk of maintenance. But for this voluntary act of Whitney it may be that the new railroad would have

been laid out upon a different location, would have crossed the Cheshire railroad at a different point, and would have created no practical obstacles to the construction desired.

In another aspect also the situation of the parties has been changed since 1849. Traffic has largely increased since that time. Much heavier engines and rolling stock are now used. Accordingly the type of construction for both road and road-bed has been made heavier and more solid. Increased strength must be provided for in carrying a canal or culvert across or under the tracks. Nor can we forget that the railroad company is under a very onerous obligation to see to it that its tracks and structures are safe for the travelling public as well as for the transportation of goods. For this reason it is entitled and required to keep in its own hands and under its own control both its tracks and the ground, bridges, cuttings, embankments and other structures upon which its tracks rest. *McElroy v. Nashua & Lowell Railroad*, 4 Cush. 400. *Brainard v. Clapp*, 10 Cush. 6. *Curtis v. Eastern Railroad*, 14 Allen, 55, 58. *May v. New England Railroad*, 171 Mass. 367, 369. *Jackson v. Rutland & Burlington Railroad*, 25 Vt. 150. *Connecticut & Passumpsic Rivers Railroad v. Holton*, 32 Vt. 43. *Hayden v. Skillings*, 78 Maine, 413. *Cairo, Vincennes & Chicago Railway v. Brevoort*, 62 Fed. Rep. 129, 135. And see the strong language of Braley J., in *Boston & Maine Railroad v. Hunt*, ante, 128, decided since this case was argued. Culverts and canals across the tracks are doubtless sometimes necessary; but their presence must involve some increase of risk, and even independently of the evidence in this case it is matter of common knowledge that their existence ought not to be allowed where it can be avoided. The public interest here cannot be overlooked. But where that is involved, the doctrine of laches will be applied more strictly than otherwise would be done. *Kenny v. Pittsburg, Virginia & Charleston Railway*, 208 Penn. St. 80. *Clark v. Cambridge & Arapahoe Irrigation & Improvement Co.* 45 Neb. 798.

In other respects the conduct of the plaintiff has been lacking in diligence. After having delayed for more than thirty-eight years to call for performance by the railroad company, he waited five and a half years more before filing his bill (see *Boston & Maine Railroad v. Bartlett*, 10 Gray, 384, and *Haughwout v. Murphy*,

6 C. E. Green, 118), and then paid so little attention to his pending suit that thirteen years afterwards (in 1906) it was stricken from the docket and only restored three years later (in 1909) upon the application of the plaintiff without objection from the defendants; and the date of the reservation indicates that it was not brought to a hearing until 1911. This is far from showing such reasonable diligence as should have been displayed. It may be, and we are willing to assume, that, since the defendants themselves might have brought the case to a hearing, this is not such laches as to bar the plaintiff from relief. *Drury v. Midland Railroad*, 127 Mass. 571, 585. But it does not recommend him to the favorable consideration of the court. It does not atone for his previous delays. See *Bancroft v. Sawin*, 143 Mass. 144; *Bowers v. Cutler*, 165 Mass. 441; *Johnston v. Standard Mining Co.* 148 U. S. 360; *Lange v. Belloff*, 8 Dick. 298; *Sebring v. Sebring*, 16 Stew. 59.

The plaintiff has been guilty of such unreasonable delay in making his request for performance and bringing his bill that no relief ought now to be given to him in equity.

Bill dismissed with costs.

JAMES J. PORTER vs. NEW YORK, NEW HAVEN, AND
HARTFORD RAILROAD COMPANY.

Worcester. October 3, 1911. — November 29, 1911.

Present: RUGG, C. J., HAMMOND, BRALEY, & SHELDON, JJ.

Negligence, Employer's liability, In freight yard, Railroad.

A laborer employed regularly in a freight yard of a railroad corporation, who in going to a place in the yard where he has been ordered to work, after looking up a track and seeing nothing coming, walks on the track without looking behind him and is struck from behind by the engine of a regular passenger train coming on that track, which is a few minutes late but which he has no sufficient reason to suppose has passed, cannot recover from the corporation for his injuries thus caused.

In an action by a laborer employed regularly in a busy and noisy freight yard of a railroad corporation against that corporation for personal injuries from being run into from behind by a regular passenger train of the defendant when the plaintiff was walking on the track, the fact, that the plaintiff did not hear a bell

or whistle behind him when another train was passing him upon an adjoining track, is not evidence of his due care, because the circumstances called for increased vigilance on his part and he had no right in such a place to trust for his safety to the chance of hearing such a signal.

In an action by a laborer employed regularly in a freight yard of a railroad corporation against that corporation for personal injuries from being run into from behind by a regular passenger train of the defendant when the plaintiff was walking on the track, evidence of a failure by the defendant to observe its established rules is immaterial on the question of the plaintiff's due care, if the rules were not made for the protection of laborers in freight yards, and had not been furnished to the plaintiff nor brought to his knowledge, and he had not observed a general practice in accordance with their requirements.

TORT under the employers' liability act for personal injuries received by the plaintiff shortly after 8.05 P. M. on June 17, 1907, while he was employed and at work as a laborer in the defendant's freight yard at Fitchburg, from being struck by a regular passenger train of the defendant which was made up at and started from the Fitchburg station at 8.05 every evening. Writ dated May 16, 1908.

In the Superior Court the case was tried before *Lawton, J.* It appeared that due notice of the injury was given by the plaintiff in accordance with the provisions of the statute. The jury took a view of the premises. On the night of the accident and for several months previously the plaintiff had been employed by the defendant as a laborer around its yard and engine house at Fitchburg and he was familiar with the surroundings. The only witness in regard to liability was the plaintiff. The material facts as shown by his testimony are stated in the opinion.

At the close of the plaintiff's evidence the judge ordered a verdict for the defendant; and the plaintiff alleged exceptions.

C. E. Tupper, for the plaintiff.

A. J. Young, for the defendant.

SHELDON, J. The plaintiff was in the employ of the defendant as a laborer. While he was at work in the railroad yard putting coal from a car upon an engine, he was ordered to go to the "sand house" and "sand up" an engine. He started toward the sand house, came to the track which led in that direction, stepped upon the track, looked up and saw nothing coming, and then proceeded along the track, without looking behind him, was struck from behind by the engine of a train coming upon

that track, and received the injuries for which he seeks to recover. Plainly upon these facts his own negligent conduct contributed to the happening of the accident and he cannot recover, unless there is something to justify his failure to look out for his own safety. *Byrnes v. New York, New Haven, & Hartford Railroad*, 195 Mass. 487. *Morris v. Boston & Maine Railroad*, 184 Mass. 368. *Judge v. Elkins*, 183 Mass. 229. *Jean v. Boston & Maine Railroad*, 181 Mass. 197.

A signal ahead of him, but some four hundred or five hundred feet distant, was set to stop there a train coming from behind him. But this furnished him no protection and no assurance that he might not be hit by such a train; for there was in this, as he knew, nothing to stop a train until it should have gone a considerable distance beyond the point where he was walking. He did not contend that the position of the signal indicated that the train which struck him had gone out. While he said in one part of his direct examination that when he saw the signal his belief would be "that the engine had gone out with the train," he immediately added in cross-examination that the position of the signal "would not indicate one way or the other whether the train had gone out or was in the station;" and he repeated this with emphasis. And it is scarcely material whether he was struck by one or another engine. He was in a position where, as he knew, he was in danger of being struck by some engine; this was one of the perils of his employment; and he simply ran the risk of what might happen.

Nor is the fact that the train which struck him was some minutes late any justification for his conduct. There was nothing more to make him think that it had passed by on time, and it is not unusual for a railroad train to be somewhat late, especially at a way station on a through route, even though it is made up at that station as its starting point. It would still be so, even if, as the plaintiff testified, he had never known of this train failing to go out "about on time." This is by no means inconsistent with its being a few minutes late. His further statement that it "always went out on time so far as he knew" was manifestly not intended as a correction or alteration of his former statement. But taking this at its strongest, it shows no excuse for a failure to look behind him when he did not claim

to have any other reason for thinking that the train might have gone.

That he did not hear a bell or whistle behind him is not material. He was in a railroad yard, a busy and noisy place. A train was just passing him upon an adjoining track. He scarcely would be expected to hear a bell or whistle or the sound of another train behind him. The circumstances called for increased vigilance on his part. *Skinner v. Boston & Maine Railroad*, 200 Mass. 422. *Cannon v. New York, New Haven, & Hartford Railroad*, 194 Mass. 177. *Vecchioni v. New York Central & Hudson River Railroad*, 191 Mass. 9, 14. He ought not in such a place to trust to such a chance for his safety.

If the defendant's servants in charge of the train failed to observe the established rules, this is evidence of negligence for which the defendant might be responsible under R. L. c. 106, § 71, cl. 3. See now St. 1909, c. 514, § 127, cl. 3. But the plaintiff did not claim to have been familiar with these rules or to have relied upon them. They were not made for his protection; they had not been furnished to him or brought to his knowledge; he had not observed a general practice in accordance with their requirements. Such cases as *Davis v. New York, New Haven, & Hartford Railroad*, 159 Mass. 532; *Hines v. Stanley G. I. Electric Manuf. Co.* 203 Mass. 288, and 199 Mass. 522; *Santore v. New York Central & Hudson River Railroad*, 203 Mass. 437; and *Regan v. Boston & Maine Railroad*, 208 Mass. 520, are not applicable. See *Lynch v. Boston & Maine Railroad*, 200 Mass. 403; *Quinn v. Boston Elevated Railway*, 188 Mass. 473; *Morris v. Boston & Maine Railroad*, 184 Mass. 368; *Dolphin v. New York, New Haven, & Hartford Railroad*, 182 Mass. 509; *Tumalty v. New York, New Haven, & Hartford Railroad*, 170 Mass. 164; *Sullivan v. Fitchburg Railroad*, 161 Mass. 125.

The plaintiff was an experienced man. His injury was not due to any strange or unforeseen event or to any extraordinary peril, but to one of the ordinary risks of his employment, which he should have looked out for and guarded against. The verdict for the defendant was rightly ordered.

Exceptions overruled.

P. GARVAN, Incorporated, vs. NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

Hampden. October 17, 1911. — November 29, 1911.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DECOURCY, JJ.

Carrier, Of goods. Negligence. Practice, Civil, Exceptions, Election between counts. Evidence, Competency, Res inter alios. Contract, Validity, Implied in law. Sale, Delivery.

A stipulation in a bill of lading of goods transported by rail, that the carrier shall not be liable for any loss or damage "by fire for any cause whatsoever occurring" during the transit, does not relieve the carrier from liability for loss of or damage to the goods by a fire caused by the negligence of the servants of the carrier.

In an action against a railroad corporation for injury by fire to goods of the plaintiff delivered to the defendant as a common carrier for transportation, where it appears that by the terms of the bill of lading the carrier is exempted from liability for loss or damage by fire and the plaintiff to hold the defendant liable must prove that the fire that injured the goods was caused by the negligence of the defendant or its servants, if it appears that the fire which partially destroyed the goods occurred when the goods were in a car in the defendant's freight yard at their place of destination, and there is evidence on which it could be found that the seals on the doors of the car had remained unbroken, excluding the intrusion of strangers, it is for the jury to determine upon all the evidence whether the only reasonable explanation of the origin of the fire involves negligence of the defendant's servants.

In an action against a railroad corporation for injury to goods of the plaintiff by a fire alleged to have been caused by negligence of the servants of the defendant while the goods were in a car standing on a side track in a freight yard of the defendant, the defendant offered in evidence a report of an investigation as to the origin of the fire made by the detective department of the district police of the Commonwealth under R. L. c. 32, § 2, St. 1904, c. 483. No statement was made as to the contents of the record. The presiding judge excluded the record. *Held*, that the exclusion could be sustained on the narrow ground that, no statement having been made of what the record, if admitted, would have disclosed, the defendant was not shown to have been prejudiced by its exclusion; but, assuming that the report would have exonerated the defendant, it was incompetent, the inquiry under the statute having been instituted for the information and benefit of the public as an aid in the detection of crime, and not having been a proceeding to ascertain the defendant's civil liability in which the plaintiff could have appeared and have been heard.

Where goods are transported by a railroad corporation to one of its stations, at which the rule for the delivery of goods requires that the consignee shall be notified of their arrival, and the car containing the goods is left standing on a side track in the corporation's freight yard, where, before any notice has been given to the consignee of the arrival of the goods, they are injured by fire

while still in the car, the corporation has not become a mere warehouseman and its liability for the injury is that of carrier of the goods.

Where goods are sold by sample at the buyer's place of business and the seller ships the goods by railroad consigned to the buyer who has given no directions for transportation, the seller paying the freight charges, the title to the goods remains in the seller until they have been delivered by the carrier to the buyer and have been accepted by him, and, if the goods are injured by fire while in the hands of the carrier, the right of action for such injury is in the seller.

In an action against a railroad corporation for injury by fire to goods of the plaintiff delivered to the defendant as a common carrier for transportation, it appeared that, upon the refusal of the consignee to receive the damaged goods, the railroad corporation sold them and retained the proceeds. The declaration contained a count in tort alleging negligence of the defendant in permitting the goods to be destroyed by fire while in its hands as a common carrier, and a count in contract for money had and received. There was evidence on which negligence of the defendant could have been found. The defendant contended that the fire originated from spontaneous combustion, in which case it would not be liable under the terms of the bill of lading. The presiding judge refused to compel the plaintiff to elect between his count in tort and that in contract, but instructed the jury that the plaintiff could not recover on both counts. *Held*, that the refusal and the instruction were correct; that, if the jury accepted the defendant's theory that the fire originated from spontaneous combustion, the plaintiff could not recover in tort but was entitled to the amount of the proceeds received by the defendant from the sale of the damaged goods.

CONTRACT OR TORT for the value of twenty bales of rags alleged to have been damaged by fire on May 28, 1908, when they were in the possession and control of the defendant as a common carrier at the defendant's freight yard in that part of West Springfield called Mittineague. Writ dated November 18, 1909.

In the Superior Court the case was tried before *Crosby, J.* The first count of the declaration, which was for an alleged conversion, was waived by the plaintiff at the trial. The second count was to recover the full value of the rags and alleged that the defendant negligently permitted them to be destroyed by fire while in its possession as a common carrier. The third count, added by amendment, was for money had and received. It appeared that on May 21 and 22, 1908, the agent of the plaintiff delivered the bales of rags at the freight station of the Boston and Maine Railroad in Holyoke for shipment to the Southworth Paper Company at Mittineague in West Springfield. "The car of rags in which the fire took place was on a siding near the coal sheds" at the defendant's Mittineague freight yard. The provisions of the bill of lading containing the contract of transpor-

tation are described in the opinion, where also the other material facts sufficiently appear.

At the close of the evidence the defendant, in addition to others which were given by the judge, requested the following instructions:

"1. Upon all the evidence the plaintiff is not entitled to recover."

"8. Upon all the evidence the plaintiff is not entitled to recover under the second count."

"17. If this carload of rags was sold to the Southworth Company by the plaintiff, and given by the plaintiff to the defendant to be delivered to the Southworth Company as consignee, in accordance with the contract of sale, the title passed from the plaintiff to the Southworth Company on delivery to the defendant.

"18. There is no evidence of a rescission of this sale revesting title in the plaintiff."

"22. Upon all the evidence the plaintiff is not entitled to recover under the third count.

"23. Unless the title was revested in the plaintiff, the plaintiff cannot recover under the third count."

The judge refused to give any of these instructions.

The plaintiff having waived its first count for conversion, the defendant asked the judge to compel the plaintiff to elect between the second and the third counts. The judge refused to compel the plaintiff to elect, and instructed the jury that the plaintiff could not recover on both counts. It was agreed that, if the plaintiff was entitled to recover on the second count it was entitled to \$538.70, and that if the plaintiff was entitled to recover on the third count it could recover only \$120.48, and the judge so instructed the jury.

The judge submitted to the jury the question "Was the fire in the car, and the damage to the rags, caused by the negligence of the defendant?" To this question the jury answered, "Yes."

The jury returned a verdict for the plaintiff in the sum of \$538.70, the full value of the rags; and the defendant alleged exceptions.

The case was submitted on briefs.

G. H. Fernald, Jr., & F. L. Watson, for the defendant.

A. L. Green & F. F. Bennett, for the plaintiff.

BRALEY, J. The bill of lading by its terms regulated the entire transportation, and, not having been limited to the first carrier by whom the bales of rags were received and accepted with the through rate prepaid, the defendant as the succeeding and last carrier is entitled to the benefit of the exemptions found in the contract. *Farmington Mercantile Co. v. Chicago, Burlington, & Quincy Railroad*, 166 Mass. 154. *Moore v. New York, New Haven, & Hartford Railroad*, 173 Mass. 835. *Adams Express Co. v. Harris*, 120 Ind. 73. *Etna Ins. Co. v. Wheeler*, 49 N. Y. 616. *Cote v. New York, New Haven, & Hartford Railroad*, 182 Mass. 290. *Evansville & Crawfordsville Railroad v. Androscoggin Mills*, 22 Wall. 594. And, it having been stipulated that the carrier should not be liable for any loss or damage "by fire from any cause wheresoever occurring" during the transit, the defendant relies upon this exemption in bar of the action.

It has long been settled that, while just and reasonable conditions may be imposed limiting his liability as it existed at common law, the carrier cannot be relieved where goods are lost or destroyed during carriage through his own negligence or the negligence of his servants or agents, although in terms the contract of shipment may exonerate him. The stipulation is invalid because against public policy. *Hoadley v. Northern Transportation Co.* 115 Mass. 804. *Cox v. Central Vermont Railroad*, 170 Mass. 129, 186, 187. *Bernard v. Adams Express Co.* 205 Mass. 254, 258, 259. The plaintiff under the second count was required to prove that the fire, which partially destroyed the rags while they were in the car at the place of destination, occurred through the defendant's neglect. *Willett v. Rich*, 142 Mass. 356. *Wylie v. Marinofsky*, 201 Mass. 583. When shipped, the goods were encased in burlap, and in good condition, and there was no delay during the short period of transportation. The condition of the seals on the car doors, which upon conflicting evidence the jury could find remained unbroken, excluded any inference of the intrusion of strangers, and upon all the evidence it was for them to determine whether the only reasonable explanation as to the origin of the fire inculcated the defendant's servants, for whose carelessness it would be responsible.

Stowe v. New York, Boston & Providence Railroad, 113 Mass. 521, 524.

The exclusion of the report of investigation as to the origin of the fire conducted under the provisions of St. 1894, c. 444, and R. L. c. 32, § 2, as amended by St. 1902, c. 142, St. 1903, c. 365, and St. 1904, c. 433, offered by the defendant, might be sustained on the narrow ground that no prejudice is shown to have been suffered. What the record would have disclosed, if admitted, is not stated. *Lee v. Tarplin*, 188 Mass. 52, 54. But, even on the assumption that the defendant had been exonerated, the report was incompetent. The proceedings were instituted for the information and benefit of the public and as an aid in the detection and punishment of crime. It was not an inquiry for the ascertainment of the defendant's civil liability, where the plaintiff could have appeared and been heard. *Fogg v. Pew*, 10 Gray, 409. *McMahon v. Tyng*, 14 Allen, 167. *Commonwealth v. Cannon*, 97 Mass. 337.

Nor had the defendant become a warehouseman. The defendant's rule, for the delivery of goods at the station, required that the consignee should be notified of their arrival, but, no notice having been given until after the fire when acceptance was refused by the consignee, there was no delivery, even if the defendant had shown that the car had been detached and placed where it could have been unloaded. *Bachant v. Boston & Maine Railroad*, 187 Mass. 392, 393. The fifth clause of the contract * which the defendant invoked being inapplicable, as the fire occurred within less than twenty-four hours after the goods arrived, the defendant's liability as carrier had not terminated. *Rice v. Boston & Worcester Railroad*, 98 Mass. 212. *Rice v. Hart*, 118 Mass. 201.

But, if these defenses are unavailing, the refusal to give the defendant's requests that the plaintiff had parted with the title is strongly urged as ground for a new trial. The action, if in tort, where goods are lost or damaged, must be brought by the owner, although the ownership need not be absolute but may be that of a bailee. *Finn v. Western Railroad*, 112 Mass. 524,

* This clause related to "Property not removed by the person or party entitled to receive it within twenty-four hours after its arrival at destination."

580. It was said by Mr. Justice Colt in *Wigton v. Bowley*, 130 Mass. 252, 254, that "in the sale of specific chattels, an unconditional delivery to the buyer or his agent, or to a common carrier consigned to him, . . . is sufficient to pass the title, if there is nothing to control the effect of it." But the intention of the parties as to the time when title is to be transferred must be ascertained from the contract, and in the absence of any directions from the buyer, controls any presumption that delivery to a carrier is sufficient, even if in the bill of lading the goods are consigned to him. *Dr. A. P. Sawyer Medicine Co. v. Johnson*, 178 Mass. 374, 377. *Barrie v. Quinby*, 206 Mass. 259, 267. *Dows v. National Exchange Bank of Milwaukee*, 91 U. S. 618. *Dunlop v. Lambert*, 6 Cl. & F. 600. See also 35 Cyc. 316, 317, 318, and cases cited. If the evidence is conflicting, and more than one inference can be drawn, the question as to what the parties intended is for the jury. *Merchants' National Bank v. Bangs*, 102 Mass. 291. *Wigton v. Bowley*, 130 Mass. 252, 254.

By the terms of sale, which were not in dispute, the proposed purchase was by sample at the buyer's place of business, and it was a condition precedent that the shipment in bulk should correspond with the sample, and, if it did not, the consignee was under no obligation to take title or to pay the price. *Androvette v. Parks*, 207 Mass. 86. St. 1908, c. 237, § 47. *McNeal v. Braun*, 24 Vroom, 617. It having been understood that the plaintiff should deliver the goods at their destination, the defendant as the carrier undertook to perform for the plaintiff the act of delivery. The plaintiff accordingly paid the charges, and the buyer, who had given no directions for transportation, retained the right to accept or reject the goods, which could not be exercised until they arrived. *Kemensky v. Chapin*, 193 Mass. 500. *Hanson & Parker v. Wittenberg*, 205 Mass. 319, 328. The defendant's negligence having intervened before the contract had been executed, the title continued in the plaintiff, who could not have maintained an action against the consignee for goods sold and delivered. *Wheelhouse v. Parr*, 141 Mass. 593, 595. *Bacon v. Gilman*, 57 N. Y. 656. The seventeenth, eighteenth and twenty-third requests assumed that the sale was absolute, and for the reasons stated the presiding judge properly declined to give them.

The plaintiff also was rightly permitted to go to the jury on the count in contract as well as on the count in tort, and they were correctly instructed that it could not recover on both counts. If they accepted the defendant's theory, that the fire originated from spontaneous combustion, the plaintiff could not recover in tort, but was entitled to the proceeds in the defendant's possession, which, from the briefs of counsel, we infer had been received from a sale of the damaged goods after the consignee refused to receive them. *Stevens v. Sayward*, 3 Gray, 108; *S. C.* 8 Gray, 215.

Exceptions overruled.

ALBERT H. SAYLES, trustee, & another vs. EVELYN M. HALL.

Dukes County. October 23, 1911. — November 29, 1911.

Present: RUGG, C. J., HAMMOND, SHELDON, & DECOURCY, JJ. 213-40
CC 234-11

Equitable Restrictions.

An enforceable restriction in a deed of land, which limits the buildings to be erected on the premises to "a dwelling house to be used exclusively as a residence for a private family" and the necessary outbuildings, is violated by letting rooms in a dwelling house on the land to boarders and lodgers averaging in number about twelve at a time and staying for periods of about two weeks.

BILL IN EQUITY, filed in the Superior Court on August 8, 1911, by the holder of the legal title and the beneficial owner of the lot numbered 84 on Ocean Avenue in Oak Bluffs against the owner of the adjoining lot numbered 86 on the same avenue to enforce the equitable restriction which is quoted below.

In the Superior Court the case was submitted upon an agreed statement of facts to *White, J.*, who with the consent of the parties reserved it upon the pleadings and the agreed statement of facts for determination by this court, such final decree to be entered as justice and equity might require.

The agreed facts were as follows:

On August 8, 1867, the Oak Bluffs Land and Wharf Company, a corporation, being seised in fee of a tract of land in that part of Edgartown now comprised in the town of Oak Bluffs, caused the

tract to be laid out into house lots, streets, avenues and parks, according to a plan which was recorded with the register of deeds for the county of Dukes County, and the lots were placed upon the market for sale. The deeds prepared by the company and used by it in all its conveyances of all the lots situated on Ocean Avenue in Oak Bluffs were the same in form and contained certain conditions which included the following: "The said grantee shall within one year from the date hereof cause to be erected on the granted premises, a dwelling house, to be used exclusively as a residence, for a private family, and no other buildings except the necessary out buildings requisite, and to be used exclusively for domestic purposes, shall ever be erected thereon."

The plaintiffs and the defendant held through mesne conveyances under the same form of deed. Dwelling houses were erected on the lots within one year by the original grantees. The dwelling on lot No. 84 had been used up to the time of the agreed statement as a residence for a private family. The dwelling on lot 36 was used up to June, 1908, as a residence for a private family. On June 9, 1908, the defendant purchased lot No. 36. Both the plaintiffs and the defendant used the dwellings on the lots only during the summer and autumn seasons. During the season of 1908 the defendant kept three boarders in the dwelling on lot No. 36. During the summer of 1909 the defendant let her dwelling house on lot No. 36 to a private family. During the autumn of 1909 the defendant kept two or three boarders in the dwelling on lot No. 36. During the season of 1910 and 1911 the defendant occupied the dwelling house as her residence and kept boarders and let rooms in the dwelling house on lot No. 36, the boarders and roomers averaging in number about twelve persons at any one time, and the average stay of the individual boarders or roomers being two weeks, excepting as to a few who remained throughout the season. About one half the roomers and boarders kept by the defendant in the dwelling house on lot No. 36 were friends of the defendant, and for that reason were only charged about the exact cost of their keep. The other boarders and roomers kept by the defendant in the dwelling on lot No. 36 paid the full price. The defendant did not place any sign on the dwelling on lot No. 36 or advertise

in any way or make known to the public that she kept boarders or roomers in the dwelling on lot No. 36. The first knowledge that the plaintiffs had that the defendant furnished lodgings as aforesaid was in the autumn of 1910, just after the close of the autumn season. In the latter part of June, 1911, the plaintiffs for the first time were convinced that the defendant was furnishing board and rooms as aforesaid. On July 31, 1911, the plaintiffs, by their attorneys, requested the defendant to cease furnishing rooms and food to people for hire and reward, and notified the defendant that the plaintiffs felt that such use of the dwelling at No. 36 was a violation of the conditions and restrictions in the original deed of the Oak Bluffs Land and Wharf Company.

Three dwelling houses, numbered respectively 11, 13 and 15 Ocean Avenue, were used at divers times by the occupants for the purpose of letting rooms and furnishing meals, and the dwelling house No. 11 Ocean Avenue has been used for such purpose for more than twenty years. There were no signs or advertisements on any of the three dwellings at Nos. 11, 13 and 15 Ocean Avenue, or anything to indicate that boarders or lodgers would be provided for at these houses. The plaintiffs had no knowledge that the houses numbered 11, 13 and 15 Ocean Avenue ever were used for the purpose of furnishing people with board and lodging, until the time of agreeing to these facts. In a large number of the dwellings on streets and avenues other than Ocean Avenue boarders and lodgers have been kept for many years in Oak Bluffs, and the original deeds of the lots where these dwellings are situated contained the same conditions as the original deed of lots 36 and 34. The plaintiffs had no knowledge that these dwellings were so used until the time of the agreement of the facts. On all the lots on Ocean Avenue substantial dwelling houses were erected and used as required by the deeds excepting on lots 2 and 4, on which twenty years or more before the filing of the bill there was erected a clubhouse which was maintained up to about ten years before the filing of the bill, when it was destroyed and a private residence was erected thereon. With that exception, Ocean Avenue always has been a very high class residential district.

The case was submitted on briefs.

E. L. McManus & G. H. Lucey, for the plaintiffs.

B. T. Hillman, for the defendant.

DECOURCY, J. The defendant's deed was in the form adopted for the conveyance of all the lots on Ocean Avenue by the Oak Bluffs Land and Wharf Company, the predecessor in title of the plaintiffs and the defendant. One of these deeds was before this court in the case of *Hopkins v. Smith*, 162 Mass. 444. As was said in that case, "the conditions and restrictions . . . were inserted for the benefit of purchasers from that company, who took deeds subject to these conditions and restrictions, and for the benefit of the grantees of such purchasers, and . . . therefore the restrictions can be enforced in equity by and against such grantees."

We are of opinion that the keeping of boarders and letting of rooms to the extent set forth in the agreed facts is a violation of the restriction in the defendant's deed limiting the buildings upon the premises to "a dwelling-house to be used exclusively as a residence for a private family," and the necessary outbuildings. *Gannett v. Albree*, 108 Mass. 372. *Skillman v. Smatheurst*, 12 Dick. 1. *Hobson v. Tulloch*, [1898] 1 Ch. 424.

No such change in the character of the neighborhood is shown as to render applicable the doctrine laid down in *Jackson v. Stevenson*, 156 Mass. 496. While it appears that the occupants of the houses numbered 11, 13 and 15 Ocean Avenue have let rooms and furnished meals at divers times, there were no signs displayed to indicate that lodgers or boarders were provided for. Further, these are but three of the forty-four dwelling houses on the avenue; and the agreed facts expressly state that Ocean Avenue always has been a very high class residential district. Still less are the plaintiffs to be deprived of a remedy by reason of changed conditions on other streets and avenues, due to the fact that a number of owners have accommodated boarders and lodgers in apparent violation of the provisions of their deeds. So far as Ocean Avenue property is concerned there has been shown no such change of conditions affecting its character and use as to warrant a finding that the restrictions have ceased to be binding. *Stewart v. Finkelstone*, 206 Mass. 28.

The defense of laches is not sustained. The defendant did

not make known to the public by sign or advertisement that she kept boarders or lodgers. The plaintiffs acquired their first knowledge of the fact after the autumn season of 1910; and it is agreed that they were convinced for the first time in the latter part of June, 1911, that the defendant was furnishing board and rooms. Notice to the defendant and suit promptly followed. And the plaintiffs had no knowledge that any of the other houses on Ocean Avenue or on other streets were used for furnishing people with board and lodging until the agreed statement of facts was prepared. *Bacon v. Sandberg*, 179 Mass. 896. *Codman v. Bradley*, 201 Mass. 861.

Decree for the plaintiffs.

ENTERPRISE BREWING COMPANY vs. EMILY CANNING.

Bristol. October 23, 1911. — November 29, 1911.

Present: RUGG, C. J., HAMMOND, BRALEY, & DECOURCY, JJ.

212-208
215-82
244-158

Bills and Notes. Guaranty.

The rule, that in the absence of any proof to the contrary the parties to a promissory note are liable on it according to the legal effect of the instrument, here was applied in a case where the guarantor of a note, when sued by the payee, contended that she was liable for only half the amount of the note because by an agreement between her and the payee at the time the note was given she and the payee were to be joint guarantors of the note for the benefit of the maker, who was her husband, but there was no evidence tending to show such an agreement.

CONTRACT against a married woman as the guarantor of a promissory note made by her husband. Writ dated July 8, 1910.

The note sued upon was dated May 11, 1909, and was for the amount of \$850, payable four months after date to the order of the plaintiff. It was signed as maker by William H. Canning, the husband of the defendant. On the back of the note was the following: "For value received hereby guarantee the payment of the within note and any renewal of same, and hereby waive protest, demand and notice of non-payment thereof. Emily Canning."

In the Superior Court the case was tried before *Hardy, J.* William H. Canning, the husband of the defendant, testified that he built a building and that the Enterprise Brewing Company, the plaintiff, helped him out in the way of a note secured from the Pocasset Bank; that the plaintiff found the money and signed the note; that the note was sometimes indorsed by his wife and the plaintiff and sometimes by the plaintiff alone; that the note for \$850 was for the balance of this original note which was for \$1,200 borrowed at the bank with the assistance of the plaintiff and the defendant. The defendant testified that she never had any talk with the plaintiff about signing the note, but that she knew the plaintiff signed it with her, and that the note was given to raise money at the bank for her husband.

The judge instructed the jury that if they found that there was consideration for the signing of the note, they must find for the plaintiff for the total amount of the note and interest, and that there was no evidence that the plaintiff and the defendant were joint accommodation indorsers. The defendant excepted to this instruction.

After the jury had retired they sent a written communication to the presiding judge "asking whether it would be legal to bring in a verdict for half of the \$850 note," and the judge replied to them in writing that they could not do so; that they must follow his instructions. The defendant excepted to this additional instruction.

The jury returned a verdict for the plaintiff in the sum of \$908.41; and the defendant alleged exceptions. Myers, mentioned in the opinion as a witness, was the treasurer of the plaintiff.

A. S. Phillips, for the defendant.

J. A. Kerns, for the plaintiff.

HAMMOND, J. "In the absence of any proof to the contrary, the parties to a promissory note are liable on it according to the legal effect of the instrument; that is to say, the maker is liable to the payee and indorsees, the payee to the indorsees, and each indorser to the subsequent indorsees. It may be proved by parol that the relation of the parties to each other is different from this; for example, that the payee or indorsee was the real principal, or that all the parties were joint principals, or some of

them joint sureties." *Sweet v. McAllister*, 4 Allen, 353, 354. According to this general rule the defendant is liable to the plaintiff for the whole amount unless by agreement between themselves they were joint guarantors or joint sureties, in which case the defendant would be liable to the plaintiff for only one half of that amount.

We think the evidence insufficient to show such an agreement either express or implied. The defendant testified "that she never had any talk with the plaintiff about signing the note, but that she knew the plaintiff signed it with her, and that the note was given to raise money at the bank for her husband." The evidence of Myers does not show or tend to show any such agreement. See *Sweet v. McAllister*, *ubi supra*. The fact that in the series of renewals, of which the note in question seems to have been the last, there was a change in the order of the indorsements or guarantees does not raise any presumption of such an agreement. Even although the defendant was a prior indorser or guarantor of some of the former notes, the change in the order is as consistent with the view that it was made as a condition of the plaintiff's consent to a renewal as with the view that it was made inadvertently or as a matter of indifference. See *Palmer v. Field*, 27 N. Y. Supp. 736. The maker of the note to whom if anybody such an agreement should be known, although called as a witness, says nothing of such an agreement. The ruling of the presiding judge on this matter was correct.

The defendant contends that she should not be held for costs on the ground, as she alleges, that the declaration is not in the form of an action against a co-surety, but there is nothing in this. There is no evidence that she was a co-surety.

Exceptions overruled.

MARGARET MORLEY vs. UNION COTTON MANUFACTURING
COMPANY.

Bristol. October 23, 1911. — November 29, 1911.

Present: RUGG, C. J., HAMMOND, BRALEY, & DeCOURCY, JJ.

Negligence, Employer's liability.

In an action by a weaver in a cotton mill against her employer for personal injuries caused by the plaintiff stepping in a hole or depression in the floor of a dark passage back of the looms tended by the plaintiff, through which she had occasion to pass in oiling the looms, if it appears that the depression was about five by six inches and about an inch deep in the centre with a ragged edge all around it and that it had been allowed to remain in practically the same condition for about two years, although it had been known during the whole of that time to the defendant's "second hand" in charge of the room, there is evidence of a defective and dangerous condition of the floor which the defendant by the exercise of due diligence should have remedied.

A weaver in a cotton mill does not assume as a condition of her employment the risk of injury from a depression in the floor of a dark passage, back of the looms which she tends, through which she has to pass in oiling them, if the depression, which is about five by six inches and about an inch deep in the centre with a ragged edge all around it, is nearly filled with cotton waste dark and discolored like the rest of the floor so that it would not be noticed without a careful inspection, and she has not seen the depression or been told of its existence.

TORT for personal injuries sustained by the plaintiff on August 2, 1909, while at work as a weaver in the defendant's cotton mill at Fall River. Writ dated August 21, 1909.

In the Superior Court the case was tried before *Wait, J.* It appeared that the plaintiff's injuries were caused by her foot slipping in a hole or depression in the floor of an alley back of the eight looms operated by the plaintiff, into which she had gone for the purpose of oiling the looms, that she had oiled one of the looms and, as she was going to oil the next one and had the oil can in her hand, her foot slipped "as if something gave way under" it, and she fell. She described the hole as "all ragged" and as being about as large as her hand, and testified that it was dark there and that she never had seen the hole before. Another witness described the hole as being about as large as her hand and testified that it was dark and looked like wood that had been decayed and rotted.

One Keefe, a witness called by the defendant, whose testimony

is referred to in the opinion, testified that he was at the time of the trial an overseer in the defendant's mill, but that at the time of the accident he was "second hand;" that he hired the plaintiff; that she came to work on June 10; and that on June 18 she began work on the looms where she was hurt and worked on them up to the time of the accident; that he first saw the depression in the floor where the plaintiff was hurt about "four years ago"* and that it had been there practically in the same condition up to the time of the accident; that it first appeared to be about five by six inches; that it was as deep as the floor was thick, about an inch in the centre, and had a ragged edge all around; that it was situated five inches out from the bottom of the loom, and about six inches back from the alley; that he saw it after the plaintiff was hurt, and that it remained there until the section of the floor [which was used at the trial] was cut out in January, 1911.

On cross-examination he testified that the hole or depression was dark and discolored; that he went by it through that alley about four times a day; that he could not say whether he noticed the hole as he went by there a week before the plaintiff was hurt, although he knew that it was there; that he could not say that he noticed it in any of the three previous weeks; that it was not a thing that you would notice easily. "Q. It was hard to see it, hard to discover it? A. If you got down, looked down at the floor you would notice, but if you were walking along the alley you wouldn't notice. — Q. It wasn't a thing that would attract your attention as you stood in the alley? A. Not unless your attention was drawn to that spot. If you were looking down you would see it. — Q. Then you saw a place discolored very much like the floor that was there? A. You could notice the hole there, the depression. — Q. And it was very much discolored like the rest of the floor, that is right, isn't it, Mr. Keefe? A. Yes. — Q. A part of it was filled up with this soft filling? A. Yes. — Q. A greater part of it was filled up with this soft filling, wasn't it? A. Yes. — Q. How much of it wasn't filled with that filling? A. Well, I couldn't say how much wasn't. It was pretty well filled up with waste."

* The trial was in 1911, the exceptions being allowed on July 22 of that year.

At the close of the evidence the judge ordered a verdict for the defendant; and the plaintiff alleged exceptions.

C. R. Cummings, (*J. W. Nugent* with him,) for the plaintiff.

D. F. Slade, for the defendant.

BRALEY, J. The jury from the testimony of the defendant's "second hand," who hired the plaintiff, could have found, that the hole or depression which had been in existence four years before the accident, by reason of its length, width, and depth, with a ragged edge, caused the floor to be defective and dangerous, either at common law or under the statute, and that the defendant by the exercise of due diligence should have known of and remedied the defect. *Huddleston v. Lowell Machine Shop*, 106 Mass. 282. *Foster v. New York, New Haven, & Hartford Railroad*, 187 Mass. 21. *Thompson v. American Writing Paper Co.* 187 Mass. 98.

It is said by the defendant that the plaintiff assumed the risk of injury from these conditions. But, while she accepted obvious dangers incident to her employment, the jury upon conflicting evidence would have been warranted in finding that the accompanying circumstances as to location, light and accumulation of waste material in the hole were sufficient to prevent its discovery without careful inspection. If they so determined, the defect was either wholly or partially concealed, and the plaintiff did not undertake to relieve the defendant from liability. *Crimmins v. Booth*, 202 Mass. 17, 22.

The case at bar is distinguishable from *Gleason v. Smith*, 172 Mass. 50, and kindred cases where from actual observation or from common experience and knowledge the construction of a machine, or the projections of parts of the mechanical equipment, or a floor with uncovered openings or uneven surface, having been plainly visible, the employee was held to have assumed the risks of the business as conducted by the defendant. *Goodridge v. Washington Mills Co.* 160 Mass. 234. *Nealand v. Lynn & Boston Railroad*, 173 Mass. 42. *McCafferty v. Lewando's French Dyeing & Cleansing Co.* 194 Mass. 412. *Connolly v. Furbush*, 201 Mass. 271. The plaintiff in her testimony stated, that she never had observed or been informed of the depression, and that when injured she was necessarily passing over it in the usual performance of her work. The obligation of the defendant to provide a reason-

ably safe place or ways and works where this duty of service could be discharged afforded a presumption on which the plaintiff could rely, that there were no unseen dangers which might lead to bodily harm. If she still was required to take ordinary precautions, and could not disregard exposed conditions clearly perceptible, yet in view of her further evidence, that the place was not well lighted, the effect to be given to her previous opportunities for observation, while important, was for the consideration of the jury, to whom the question of the plaintiff's due care as well as of the defendant's negligence should have been submitted. *Peterson v. Morgan Spring Co.* 189 Mass. 576. *Finnegan v. Winslow Skate Manuf. Co.* 189 Mass. 580.

Exceptions sustained.

EDWARD SCANLON vs. THOMAS F. CAVANAUGH & others.

Bristol. October 23, 1911. — November 29, 1911.

Present: RUGG, C. J., HAMMOND, BRALEY, & DECOURCY, JJ.

216-591
d 235-1142
248-401

Negligence, Employer's liability. Animal, Specific instances showing vicious habit.

In an action by a hostler against the proprietor of a large livery stable employing him, for personal injuries sustained by reason of the running away of a pair of horses which the plaintiff was driving by order of the defendant, where it was not controverted that the plaintiff was in the exercise of due care, the plaintiff sought to recover on the ground that one of the horses was unsafe for driving and that the defendant knew or ought to have known that this horse had a habit of running away. There was evidence that on three different occasions during the eight months preceding the accident this horse had run away with its driver, that the last time it ran a mile and a quarter and then was stopped only by running it against a tree, and that each of the other times it ran at least a quarter of a mile before it could be controlled. There also was evidence of this horse's shying at electric cars and kicking in harness, and there was testimony that two months before the accident the manager of the defendant's stable had information in regard to the horse's character. *Held*, that from this evidence of particular instances it could have been found that the horse had a habit of running away, and that there was evidence to justify a finding that the defendant knew of this vicious habit, so that the case was one to be submitted to the jury.

TORT by a hostler, employed in the livery stable of the defendants in Taunton, for personal injuries alleged to have been caused by the defendants furnishing the plaintiff with unsafe

and unmanageable horses, which were known to the defendants to be dangerous. Writ dated July 9, 1910.

In the Superior Court the case was tried before *Sherman, J.* The facts shown by the plaintiff's evidence are stated in the opinion. At the close of the plaintiff's evidence the judge, at the request of the defendants, ordered a verdict for the defendants, and by agreement of counsel reported the case for determination by this court. If the ruling of the judge was wrong, judgment was to be entered for the plaintiff in the sum of \$450, without costs; otherwise, judgment was to be entered on the verdict.

R. P. Coughlin, (L. H. Coughlin with him,) for the plaintiff.

D. F. Slade, for the defendants.

DECOURCY, J. The plaintiff was an employee of the defendants who maintained a large livery stable. He was a cripple, not having the full use of his right arm and leg. His employment was that of a hostler in the stable, and occasionally he was sent out to drive when the drivers were absent. Upon his return from dinner on the day of the accident, one of the defendants ordered him to drive to a funeral a hack that was standing ready, hitched to two horses. On the way from the cemetery the horses ran away with the plaintiff and came into collision with an electric car, in consequence of which he was thrown to the ground and injured.

The plaintiff's due care was not controverted. His right of recovery is based on the ground that one of the horses was unmanageable and unsafe for driving, and that the defendants knew, or in the exercise of reasonable care ought to have known, that this horse had a habit of running away. *Palmer v. Coyle*, 187 Mass. 136. Witnesses who had hired this horse from the defendants testified to three different occasions during the eight months preceding the accident when the horse ran away with its driver. The last time it ran a mile and a quarter and then was stopped only by running it against a tree. The other times it ran at least a quarter of a mile before it could be controlled. There was also testimony of its shying at electric cars, and kicking in harness. From this evidence of particular instances a jury would be warranted in finding that the horse had a habit of running away. *Broderick v. Higginson*, 169 Mass. 482. And there

was evidence to justify a finding that the defendants knew of this vicious habit. Not only did these public manifestations of the habit furnish some basis for an inference of knowledge, but there was testimony that the manager of the stable, one Bills, was informed of it two months before this accident.

The case should have been submitted to the jury. In accordance with the report, judgment is to be entered for the plaintiff in the sum of \$450, without costs.

So ordered.

JAMES M. LUDDY vs. OLD COLONY STREET RAILWAY COMPANY.

Bristol. October 23, 1911. — November 29, 1911.

Present: RUGG, C. J., HAMMOND, BRALEY, & DeCOURCY, JJ.

Negligence, Street railway.

In an action against a street railway corporation for personal injuries sustained while the plaintiff was being transported as a passenger in a vestibule car of the defendant, it appeared that the plaintiff's injuries were caused by the falling upon him of a bundle about six and a half feet long and about three and a half inches in circumference, which consisted of three sections, tied together, of a pole used for trimming branches of trees and was placed in the vestibule of the car by an employee of a telephone company who was a passenger on the car, that the plaintiff was sitting on a side seat of the car next the rear door, that the telephone employee entered the rear vestibule of the car and remained standing there with this bundle in the presence of the conductor, that the conductor entered the car and went to the forward end of it to collect the fares of passengers, that after the conductor had entered the car for this purpose the telephone employee "stood up" the bundle with one end resting on the floor and the other end against the back framework of the vestibule, entered the car and took a seat near the door, that, when the car made its next stop, the bundle fell forward through the rear door of the car, which was open, and struck the plaintiff's leg, causing the injuries sued for. A judge, to whom the case was submitted upon an agreed statement of facts, found for the defendant, and from a judgment entered in accordance with this finding the plaintiff appealed. *Held*, that it could not have been ruled as matter of law that the defendant was negligent, that the question was one of fact, and that the judge in finding for the defendant was not shown to have made any error of law.

TORT for personal injuries sustained by the plaintiff on September 16, 1907, while the plaintiff was being transported as a

passenger on a vestibule car of the defendant, alleged to have been caused by the negligence of the servants of the defendant in permitting a pole or post to be carried on its car without being properly fastened and in such a dangerous manner that it fell and struck the plaintiff. Writ dated October 18, 1907.

In the Superior Court the case was submitted to *Aiken*, C. J., upon the following agreed statement of facts :

The plaintiff was a passenger on a closed street railway car of the defendant on September 16, 1907, on his way from Taunton to Brockton. The car was a double truck, four motor, electric car, with air brake, about forty feet long, with a closed vestibule at each end of the car, which passengers entered by a door on either side of the vestibule. The floor of the vestibule was about three or four inches lower than the level of the car floor. The vestibule was about four feet deep and about eight feet high in the clear and extended the width of the car, which was an ordinary closed vestibule car. The door from the vestibule into the car was about seven feet high and two and a half feet wide. The seats in the car were arranged as follows : In each of the four corners of the car was a seat running lengthwise of the car about five feet long, between these four corner seats were cross seats, each accommodating two persons, on each side of the car, about ten in number, with an aisle between them.

The plaintiff entered the car at Taunton and took one of the corner seats near the rear door, and at the end of that seat nearer the door. One McEachern, an employee of the Long Distance Telephone Company, entered the car about three miles from Brockton, getting into the rear vestibule and standing in the vestibule after the car started. He had with him a bundle which was tied together and was about six and a half feet long and about three and a half inches in circumference. This bundle was made up of three sections of a pole which was used by McEachern in trimming small branches of trees preparatory to the stringing of telephone wires, and when in use the sections were jointed by brass ferrules, making one continuous tool about twenty-one feet long, with a clipper on the end for the purpose of cutting small branches. When not in use the sections were disjointed and tied up and carried in McEachern's hand. They were in the last named condition when McEachern entered

the car on the day of the accident. When McEachern entered the rear vestibule, the conductor was in the rear vestibule, and McEachern remained standing there with this bundle. Shortly after, the conductor entered the car and went to the forward end of it to take the fares of passengers. After the conductor had entered the car for this purpose, McEachern stood up the bundle between the brake staff and the controller, with one end resting on the floor of the vestibule and the other end against the back framework of the vestibule and extending nearly to the top of it, and then entered the car himself by the rear door and took one of the corner seats above named, near the rear door. When the car made the next stop to take on a passenger, very shortly after, the bundle left by McEachern in the vestibule fell forward through the rear open door of the car and into the car and struck the plaintiff upon the leg, and he received the injuries sued for.

The car was of ordinary construction, such as is usually seen on street railway lines from city to city, and left Taunton at twelve o'clock, noon. The accident happened about 12.45 P. M. The day was fair and at the time of the accident the car was making a stop in the ordinary and usual way.

Upon these facts the parties agreed that if the plaintiff was entitled to judgment, it should be entered for him in the sum of \$400, without costs. If, on these facts, the plaintiff was not entitled to recover, judgment was to be entered for the defendant, without costs.

The Chief Justice found for the defendant and ordered judgment for the defendant. From the judgment entered in accordance with this order the plaintiff appealed.

R. P. Coughlin, (*L. H. Coughlin* with him,) for the plaintiff.

F. S. Hall & T. J. Feeney, for the defendant, were not called upon.

HAMMOND, J. Upon this agreed statement of facts it could not be ruled as matter of law that the defendant was negligent. That question was one of fact and not of law; therefore in finding for the defendant the judge is not shown to have made any error of law. See *Cunningham v. Connecticut Fire Ins. Co.* 200 Mass. 833, and cases there cited.

Judgment affirmed.

221-587
224-182
224-451
225-284
251-446

**MAMFRED L. GAMSON vs. WILLIAM P. PRITCHARD
& another, executors.**

Bristol. October 23, 1911. — November 29, 1911.

Present: RUGG, C. J., HAMMOND, BRALEY, & DECOURCY, JJ.

Pledge. Sale. Replevin.

At the trial of a writ of replevin against a deputy sheriff for a wagon which the defendant had attached on mesne process as the property of a partnership, there was evidence tending to show that the plaintiff had purchased the wagon for the partnership, that a bill of parcels thereof bearing the plaintiff's name as purchaser was given by the vendor to the plaintiff, and that the plaintiff's agreement with the partnership was that he "was going to own" the wagon until the partnership had paid him what he had advanced as the purchase price. The partnership took possession of the wagon directly from the vendor, and the plaintiff allowed them to retain possession until, after some time, the debt of the partnership to him remaining unpaid, he took the wagon and placed it in a yard from whose owner he had received permission thus to place it and where it was attached by the defendant. The presiding judge refused to order a verdict for the defendant. *Held*, that the refusal was proper, since the executory agreement to pledge the wagon became effectual as a pledge upon the plaintiff taking possession of the wagon before the attachment, and that, the attachment being an unjustifiable interference with the plaintiff's rights, he could maintain replevin to recover possession.

REFLEVIN of a barrel wagon which the defendants' testate, William Pritchard, a deputy sheriff of Bristol County against whom the action originally was brought, had attached on mesne process as the property of Joseph Blumberg and Edward Gamson, copartners doing business as the Bay State Barrel Company. Writ in the Second District Court of the County of Bristol dated March 6, 1909.

On appeal to the Superior Court the case was tried before *Raymond, J.* There was evidence tending to show the following facts: The plaintiff was a brother of Edward Gamson, one of the copartners above described. The copartners went to the plaintiff for his help in purchasing a barrel wagon and the plaintiff told them in substance that he would advance the money for the wagon, but that he was going to "own the team until they pay me back." He testified, "I told them that I would buy them that team and I shall have the receipt and after they

pay me back the \$65 I will give them a receipt and they can have the wagon. I wanted that as security." The copartners and the plaintiff then went to one Dunn, to whom the plaintiff paid \$10 on account of a purchase price of \$65 for the wagon and received from Dunn a statement reciting, "Mamfred L. Gamson, to John W. Dunn, Dr., . . . Sept. 30, 1908. To one barrel wagon, \$65. Cr. by cash, \$10, balance to be paid when team is taken the same to be moved by Oct. 7, 1908." Later the plaintiff paid the copartners \$55 and on October 7, 1908, they paid that amount to Dunn, who indorsed on the above statement, "Received payment in full Oct. 7, 1908." The partners then received the wagon from Dunn and used it, it never being in the plaintiff's possession until, at some time before the attachment by the defendants' testate, the plaintiff had it taken from the partnership's place of business to the yard of a brewery, from whose proprietor the plaintiff had obtained permission to put it there.

At the close of the evidence the defendants asked the presiding judge to order a verdict for them. The judge refused to do so and the case was submitted to the jury "on full instructions which were not excepted to."

The jury found for the plaintiff; and the defendants alleged exceptions.

F. A. Pease, for the defendants.

D. Silverstein, for the plaintiff.

BRALEY, J. The distinction between a mortgage and pledge of personal property frequently has been pointed out, but whether the transaction shall be treated as having the characteristics of one form of security rather than the other often must rest on the intention and conduct of the parties to be ascertained from the evidence. The question is for the jury under appropriate instructions. *Thompson v. Dolliver*, 182 Mass. 103.

The bill of parcels, even if the plaintiff was named as the buyer, contains no condition of defeasance, or stipulation that he is to hold the title as collateral security, and on its face the transaction did not amount to a mortgage. *Shaw v. Silloway*, 145 Mass. 503. *Copeland v. Barnes*, 147 Mass. 388. But the dominant purpose to secure the plaintiff in some form for money lent is free from doubt. The defendants offered no evidence to

contradict his statement, that at the request of the partnership known as the Bay State Barrel Company he advanced the price for the wagon with the understanding that the bill of parcels should run directly to him, and that the property was to be considered as security until the loan had been repaid, but that he did not take possession, and after the purchase it was delivered to the company, and used in their business. The general title having passed to the company, if the wagon then had been delivered to the plaintiff he would have become a pledgee, and actual and continuous possession by him would have been essential to preserve the lien. *Radigan v. Johnson*, 174 Mass. 68, 73. *Harding v. Eldridge*, 186 Mass. 39, 42, 43. But if a mere agreement that the creditor shall hold certain property of the debtor as security is insufficient, a pledge takes effect upon delivery and, no adverse rights having intervened, the plaintiff's actual possession of the wagon which he had taken under the bailment prior to the attachment by a creditor of the firm, although subsequent to the contract, was effectual, and completed the pledge. The executory agreement to pledge the property had become executed. *Copeland v. Barnes*, 147 Mass. 888, 890. *Parshall v. Eggert*, 54 N. Y. 18.

The attachment having been an unjustifiable interference with the plaintiff's rights, he can maintain replevin against the attaching officer to recover possession. *Way v. Davidson*, 12 Gray, 465. *Johnson v. Neale*, 6 Allen, 227.

It is stated in the record that full instructions were given which apparently were satisfactory to the defendants, and, the verdict for the plaintiff having been warranted by the evidence, the exceptions must be overruled.

So ordered.

GEORGE D. BURRAGE v. COUNTY OF BRISTOL.

Bristol. October 23, 1911. — November 29, 1911.

Present: RUGG, C. J., HAMMOND, BRALEY, & DeCOURCY, JJ.

Attorney at Law, Disbarment. Practice, Civil, Disbarment proceedings. Statute, Construction. Usage. Words, "Costs," "Expenses."

The word "costs" as applied to proceedings in court ordinarily means only legal or taxable costs and does not include counsel fees.

Where the language of a statute is of doubtful import, a construction put upon it for many years, during which the statute was not amended, by officers charged under its provisions with the performance of public duties is strong evidence of its meaning.

Where an attorney at law, acting under an order of the Superior Court authorizing him to prosecute certain disbarment proceedings and directing that "the expenses and costs of the same be paid as in criminal proceedings in this court," in such proceedings renders services and incurs liability for services of an associate counsel employed by him therein, and a judge of the Superior Court allows a reasonable charge which the attorney made therefor, the county in which such proceedings were pending must pay such charge, since the word "expenses," as used in R. L. c. 185, § 44, providing that the "expenses and costs" in such proceedings "shall be paid as in criminal prosecutions in the Superior Court," includes compensation to attorneys charged with the prosecution of the proceedings and empowers that court to award compensation to such an attorney for his services.

CONTRACT for \$906.88 upon an account annexed which included items amounting to \$500 for services rendered by the plaintiff in the prosecution of disbarment proceedings against an attorney at law, an item of \$250 paid by the plaintiff to R. A. Dean, Esquire, as his associate counsel, and items amounting to \$156.88 representing cash disbursements by the plaintiff in those proceedings.

The case was heard upon an agreed statement of facts by *Raymond, J.* It appeared that the disbarment proceedings were begun in the county of Bristol in the Superior Court by certain members of the Massachusetts Bar Association and that at the commencement of the proceedings the court made an order that the plaintiff in this action "be and hereby is authorized to prosecute the inquiry and proceedings in relation to said petition; and that the expenses and costs of the same be paid as in criminal proceedings in this court."

At the close of the disbarment proceedings, the presiding judge approved and allowed a claim of the plaintiff including the items set out in the account annexed.

The defendant objected only to the items for the services of the plaintiff and of Mr. Dean. It admitted that the charge for those services was reasonable in amount.

It was agreed, if material, "that it has been the practice for many years for counties to pay for professional services rendered in similar disbarment proceedings."

The trial judge found for the plaintiff for the full amount claimed in the declaration. The defendant appealed.

F. S. Hall, for the defendant.

J. A. Lowell, for the plaintiff.

RUGG, C. J. The question presented is whether in proceedings for disbarment of an attorney at law, under R. L. c. 165, § 44, the court is empowered to award compensation to the attorney who conducts the proceedings for the removal. The material words of the section are: "An attorney may be removed by the Supreme Judicial Court or the Superior Court for deceit, malpractice or other gross misconduct . . . ; and the expenses and costs of the inquiry and proceedings in either court for the removal of an attorney shall be paid as in criminal prosecutions in the Superior Court." The word "costs," as applied to proceedings in court, ordinarily means only legal or taxable costs, and does not include attorneys' fees. *Brown v. Corey*, 134 Mass. 249. The word "expenses," although broad enough to include counsel fees, is of varying significance, dependent upon the connection in which it is used. Under some circumstances it would not include them. See, for instance, *Marshall Fishing Co. v. Hadley Falls Co.* 5 Cush. 602. The provision in a mortgage that "costs and expenses" be retained in case of foreclosure out of the proceeds of the sale has been held to include a reasonable counsel fee. *Varnum v. Meserve*, 8 Allen, 158. *Bangs v. Fallon*, 179 Mass. 77. In proceedings under the highway act "expenses" include land damages. *Damon v. Reading*, 2 Gray, 274. *Brigham v. Worcester*, 147 Mass. 446. In *Willard v. Lavender*, 147 Mass. 15, the words "costs and expenses" as used in St. 1884, c. 181 (R. L. c. 162, § 44) were construed to authorize a reasonable allowance for professional fees as between solicitor and

client. Although there are decisions in other jurisdictions to the effect that in different connections the word "expenses" does not include counsel fees, no case has been found in substance like the present. The meaning of the word must be determined in the light of the end to be attained by the statute in which it occurs.

The subject is one of vital public interest. The removal of attorneys, who have become unfaithful to their trust and are unfit longer to exercise their office and to be held out as trustworthy, faithful and competent, is of concern to all the people. Although it is the duty of members of the bar, as public officers, to see that their body is purged of unworthy members, and the court has a right in the exercise of its inherent power to require any of its officers to institute and prosecute proceedings looking toward disbarment all without compensation (*Fairfield County Bar v. Taylor*, 60 Conn. 11, 14, *State v. Harber*, 129 Mo. 271, 294, *Byington v. Moore*, 70 Iowa, 206), and such proceedings may be instituted by the court itself (*Ex parte Wall*, 107 U. S. 265, see *Randall v. Brigham*, 7 Wall. 523; *Randall, petitioner*, 11 Allen, 473), yet the matter is of such importance that the Legislature might well be moved to make additional provision to assure the disbarment of unfit attorneys. The expenses incident to an investigation of this sort outside the time spent by the attorney prosecuting the charges, in most cases, would be small. There are considerable items in the account annexed to the present declaration for cash disbursements. But most of them would be included under a proper definition of "costs." The phrase, "expenses of inquiry," as applied to this subject matter, indicates thoroughness and comprehensiveness, which might not be implied in other relations. These words have been in our statutes dealing with this matter since 1836. It is agreed that the practice has been for many years for the counties to pay for professional services rendered in prosecuting disbarment proceedings. Where the language of a statute is of doubtful import, the contemporaneous construction put upon it by officers thereby charged with performance of public duties is strong evidence of its meaning. The understanding and application of statutory words susceptible of different meanings, through years of practice, and sanctioned by the acquiescence of the Legislature, is significant of the intention with which they were employed originally.

Rogers v. Goodwin, 2 Mass. 475. *Packard v. Richardson*, 17 Mass. 122, 144. *United States v. Hermanos y Compañía*, 209 U. S. 337. *Brown v. United States*, 113 U. S. 568, 571, and cases cited. *In re Washington Street Asylum & Park Railroad*, 115 N. Y. 442, 447. See also cases collected in *Bates & Guild Co. v. Payne*, 194 U. S. 106, at 111. All these considerations combined lead us to the conclusion that no error has been committed.

Judgment affirmed.

MARY F. RANDALL vs. MARTHA E. GRANT & others.

Bristol. October 23, 1911. — November 29, 1911.

Present: RUGG, C. J., HAMMOND, BRALEY, & DECOURCY, JJ.

Way, Private. Deed, Construction, Interpretation by acts of parties.

A right of way, created by an express reservation in a deed of land as appurtenant to a back lot, to pass through a front lot to a public street, cannot be used lawfully by a tenant of the owner of the back lot occupying land beyond that lot.

A right of way, created by an express reservation in a deed of land as appurtenant to a back lot, to pass through a front lot to a public street in a village, may be used by the teamsters of a contractor, to whom the owner of the back lot has sold gravel and sand to be taken from a sand pit on such lot, to cart such gravel and sand to the street, although when the deed containing the reservation of the way was made the back lot was used for garden and grass land and no sand pit had been opened on it; and, where it appears that the owner of the back lot has carted sand over the way during a period of eight years without any objection being made by the owner of the front lot, this fact tends to support this construction by indicating that such use of the way was contemplated when the reservation was made.

DECOURCY, J. This is a bill in equity to restrain the defendants from crossing the plaintiff's land under claim of a right of way. Walter H. Andrews, in July, 1897, conveyed the land to the plaintiff's predecessor in title, Levi C. Randall, "reserving to the grantor and his heirs and assigns a right of way through the premises to land in the rear." In January, 1908, Andrews conveyed to the defendant Grant the land in the rear referred to, which is a three acre lot; and in the granting clause of the deed is the following: "Together with a right of way from said premises to Washington Street through land of Levi C. Randall as reserved

in the deed from Walter H. Andrews to said Randall dated July 23, 1897, and through land of James E. Howard as now used." All of the lots referred to are situated in South Easton,* lying easterly of Washington Street, the westerly line of the three-acre lot being about three hundred and ten feet and the plaintiff's lot about two hundred and fourteen feet from that street.

The case was referred to a master and was reserved † for our determination upon the pleadings and the master's report. The master finds that the three acre lot was used for garden and grass land before and during the ownership of Andrews. The soil is light and underneath it, or a large part of it, is sand or gravel. Andrews opened a sand pit on the easterly portion of it not later than 1902, and drew sand therefrom over the right of way in question, selling about six hundred loads and using some for filling. After the defendant Grant acquired title to the tract she sold sand from the pit to the town, and about two hundred loads were taken over the same route that Andrews used. To these and certain other similar uses of the way no objection was made.

At the hearing before the master the plaintiff conceded that the defendant Grant had a right of way across the southerly portion of her lot from east to west, from the three acre tract to the common right of way to Washington Street, and made no objection to the location of the way. But she complains of the use to which the way has been put by the several defendants.

The defendant George W. Nye has been using the way in going from Washington Street to a house hired by him from the defendant Grant and standing on land other than the three acre piece.

The defendants William G. Irving, Hugh Cummins and James Sullivan are teamsters and are using the way in drawing sand from the sand pit on the three acre lot to the common way to Washington Street. They are employees of a contractor to whom the defendant Grant sold some sand, and the master finds that the manner of using the way in carting gravel and sand, if the defendants have the right so to use it, has been reasonable.

There is no occasion to consider the case of the defendant

* A small village in the town of Easton.

† By King, J. The master was L. Elmer Wood, Esquire.

Sanderson, as he has removed from the neighborhood and has ceased to use the way.

As against the defendant Nye the plaintiff is entitled to relief. Clearly the right of way over the plaintiff's land appurtenant to the three acre lot cannot be enlarged and extended to land beyond. *Davenport v. Lamson*, 21 Pick. 72. *Boston & Maine Railroad v. Sullivan*, 177 Mass. 280.

But we are of opinion that the remaining defendants are justified in using the way for carting sand from the three acre lot. This is not the case of a right of way by prescription, where the extent of the right is measured by the ordinary use which established it. *Baldwin v. Boston & Maine Railroad*, 181 Mass. 166. The rights of these defendants must be determined by the terms of the reservation and grant in the deeds. The language used in conveying the right of way is of the most general character, without limitation or restriction. It is broad enough to include any reasonable use to which the dominant estate may be devoted, due consideration being given to the obvious purposes which the parties had in view in establishing the way. Such a way is not necessarily confined to the purposes for which the dominant estate was used at the time the way was created. *Johnson v. Kinnicutt*, 2 Cush. 158. *Holt v. Sargent*, 15 Gray, 97. *Sargent v. Hubbard*, 102 Mass. 380. *Abbott v. Butler*, 59 N. H. 817. *Arnold v. Fee*, 148 N. Y. 214. *Gunson v. Healy*, 100 Penn. St. 42. And the fact that the defendant Grant and her predecessor in title have carted sand over this way since 1902,* without any objection being made by the plaintiff, would further indicate that the use now complained of was intended by the grant. *Rowell v. Doggett*, 148 Mass. 483.

As against the defendant Nye an injunction is to issue as prayed for; and as to the other defendants the entry must be

Bill dismissed.

The case was submitted on briefs.

A. R. White, 2nd, for the plaintiff.

A. Fuller & W. J. Davison, for the defendants.

* The bill was filed on November 80, 1910.

MANUEL RODRIQUES, administrator, vs. NEW YORK, NEW
HAVEN, AND HARTFORD RAILROAD COMPANY.

Bristol. October 28, 1911. — November 29, 1911.

Present: RUGG, C. J., MORTON, HAMMOND, & BRALEY, JJ.

Negligence, At railroad crossing, Railroad, Causing death. *Railroad*, Failure to give signals. *Evidence*, Presumptions and burden of proof, Matter of conjecture.

At the trial of an action under St. 1906, c. 463, Part I, § 63, as amended by St. 1907, c. 892, against a railroad corporation by the administrator of the estate of one who, the declaration alleged, was killed at a crossing of the railroad with a highway at grade because of negligence of the corporation or gross negligence of some of its servants or agents, there was evidence tending to show that the intestate's lifeless body was found on the crossing under a freight car of the defendant on a dark night, and that previous to that the plaintiff's intestate was last seen alive a few minutes before the accident when he was leaving a liquor saloon a few minutes' walk from the place where his body was found. There was no further evidence as to his conduct. *Held*, that the question, whether he took any precautions for his safety at the crossing, was left on the evidence entirely to conjecture so that there was no evidence for the jury as to his due care.

St. 1906, c. 463, Part II, § 147, requiring that a bell or a whistle upon a locomotive engine be sounded at a certain distance from a crossing of a railroad with a highway at grade, applies only when the locomotive itself or the locomotive with a car or cars attached to it approaches the crossing, and therefore § 245 of that part, establishing liability on the part of a railroad corporation where the death of a traveller on a highway is caused by a failure to give such signals, is inapplicable where the death is caused by one car only, without any locomotive attached to it, being sent over the crossing without any signal.

RUGG, C. J. This is an action to recover damages for the death of Joseph Rodriques, which occurred at a grade crossing of the tracks of the defendant with a public way. The declaration contains two counts. The first is under St. 1906, c. 463, Part II, § 245, by which liability is established against a railroad which fails to give signals required by said chapter, Part II, § 147, for the crossing of a public way, whereby death ensues to a traveller on the way, unless his own gross or wilful negligence or unlawful act contributed to the death. The second count is framed on § 63, Part I, of said chapter, as amended by

St. 1907, c. 892, which establishes liability on the part of a railroad or street railway for causing, by its own negligence or the gross negligence or unfitness of its servants or agents, the death of a passenger or of a person not a passenger or an employee who is in the exercise of due care. Under the second count, it was necessary for the plaintiff to prove such due care, while under the first count it was not, and the burden was cast upon the defendant of proving the gross or wilful negligence or unlawful act of the intestate as a contributing cause. *Brooks v. Fitchburg & Leominster Street Railway*, 200 Mass. 8, 14, 16. *Hamblin v. New York, New Haven, & Hartford Railroad*, 195 Mass. 555, 556.

Under the decisions of this court, it seems plain that there was no evidence of due care on the part of the deceased. He was last seen alive leaving a saloon at a distance of several minutes' walk from the crossing. A few minutes later his lifeless body was found on a grade crossing under a freight car of the defendant. There was no evidence to show his actions in the meantime. Whether he took any precautions for his own safety, as he approached the tracks, was left wholly to conjecture. The plaintiff was required by the statute to show, as a condition precedent to his recovery, that his intestate was in the exercise of due care. This means, when applied to a traveller at a railroad grade crossing, the active and intelligent exercise of his faculties to protect himself in a place of recognized danger. He was not excused because the night was dark from taking all reasonable precautions which the circumstances demanded. The absence of all evidence as to his conduct for a considerable time and distance before reaching the crossing is not a sufficient basis for an affirmative finding of due care at that place, where he was obliged to do something more than would satisfy the requirement of common prudence on the part of a traveller on a sidewalk or other portion of a public way unaffected by the perils of passing cars and trains. The case is governed upon this branch by *Walsh v. Boston & Maine Railroad*, 171 Mass. 52, 56; *Hinckley v. Cape Cod Railroad*, 120 Mass. 257, 262; *Cox v. South Shore & Boston Street Railway*, 182 Mass. 497, 499; *Moore v. Boston & Albany Railroad*, 159 Mass. 399. Cases like *Berry v. Newton & Boston Street Railway*, 209 Mass. 100, are plainly distinguish-

able. The plaintiff was not entitled to recovery on the second count.

It becomes necessary to inquire whether there was evidence for the jury on the first count. The crossing where the remains of the plaintiff's intestate were found was guarded during the daytime, but the casualty occurred after the flagman left on the evening of a December day. A freight train of the defendant had been parted east of the crossing, and the locomotive with one or two cars had proceeded westerly over the crossing to do some switching. A freight car "kicked" by this locomotive coming slowly stopped on the crossing in such a position as to block the whole street whereupon the body of the plaintiff's intestate was "found wedged under its westerly truck." There was evidence sufficient to warrant a finding that the whistle was not blown or the bell rung, as a warning for the coming of this car upon the crossing. *Slattery v. New York, New Haven, & Hartford Railroad*, 208 Mass. 453. But the requirement of said chapter 463, Part II, § 147, that a railroad corporation shall cause a bell to be rung or a whistle to be sounded, does not apply where, in switching, a single car detached from a locomotive passes a crossing. The necessary implication from said §§ 147 and 245 is that the whistle must be sounded or the bell rung only when the locomotive itself or cars attached to the locomotive pass the crossing. *White v. New York, New Haven, & Hartford Railroad*, 200 Mass. 441, 444. The reason for this well may be that the Legislature did not intend to create what might be in many instances almost an intolerable nuisance of noise in neighborhoods where highways cross switching yards or tracks used in part for switching purposes, but to leave the protection of travellers there to the general obligation resting upon railroad companies, under all circumstances to use due care at every crossing, and upon the powers conferred on the board of railroad commissioners to order the erection of gates and the stationing of flagmen. Since the car which struck the plaintiff's intestate was not one for which the statutory signals were required, the plaintiff failed to make out any case under his first count.

It becomes unnecessary to consider whether there was any negligence on the part of the defendant or gross negligence of its servants or agents. It follows that a verdict should have

been directed for the defendant, and in accordance with the terms of the report* the entry must be

Judgment for the defendant.

The case was submitted on briefs.

E. B. Jourdain, for the plaintiff.

F. S. Hall & T. J. Feeney, for the defendant.



750-7590
THOMAS H. GRIFFIN, JR., vs. EDWARD D. DEARBORN.

Essex. November 8, 1911. — November 29, 1911.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DECOURCY, JJ.

Malicious Prosecution.

In an action by a boy for malicious prosecution in causing the arrest of the plaintiff upon a charge of larceny of a horse, if on the evidence it can be found that the horse was taken from the defendant's stable by the plaintiff's younger brother, who was acting under an honest claim of right in obedience to an order which he believed to have been given to him rightfully by his father, that the defendant ought to have known that this was so and to have seen that, if any crime was committed, the father and not the son was the guilty person, and that the defendant, without making any investigation of the grounds on which the boy who took the horse was acting, believing the plaintiff to be such boy, caused his immediate prosecution on a charge of larceny, and if the defendant on his cross-examination testifies that he wanted his horse or an equivalent and that he wanted the horse and would have taken money, there is evidence for the jury that the defendant was actuated by malice and that he acted without any honest or well grounded belief that the person whom he intended to prosecute was guilty of the alleged crime.

If, at the trial of an action for malicious prosecution, the presiding judge instructs the jury that if they find that the defendant instituted the prosecution of the plaintiff from malice they should return a verdict for the plaintiff, without also plainly instructing them that the plaintiff cannot recover unless the absence of probable cause for the prosecution also is shown, and thereupon the jury return a verdict for the plaintiff, an exception by the defendant will be sustained, because the jury may have returned their verdict for the plaintiff on the ground of the defendant's malice alone without finding the absence of probable cause.

* The case was tried before *Sherman, J.* At the close of the evidence, by agreement of the parties, the presiding judge ordered the jury to return a verdict for the plaintiff for \$2,000, and reported the case to this court, judgment to be entered for the defendant if a verdict should have been ordered for it; otherwise, judgment to be entered for the plaintiff on the verdict.

TORT for malicious prosecution. Writ dated April 21, 1906.

In the Superior Court the case was tried before *Pierce, J.* The plaintiff, who was a minor, brought the action through his father and next friend. It was admitted at the trial that the defendant on April 1, 1906, swore out in the Lynn Police Court a complaint charging the plaintiff with the larceny of a horse valued at \$100; that on the following day, which was Monday, the plaintiff, who had been arrested upon the warrant issued upon the complaint, appeared in the Lynn Police Court, and at the request of counsel representing the defendant the case was continued until the following Thursday, when the plaintiff again appeared and upon the request of the defendant's counsel, who stated to the court that there was no evidence to warrant a conviction, was discharged.

On cross-examination the plaintiff testified that he was employed by his father, Thomas H. Griffin, as a helper in his blacksmith shop and had been so employed for a number of years; that he had a younger brother employed in the same shop and that this brother's duty was to go to get horses belonging to patrons of the shop who desired to have their horses shod, and to take them back to the owners after the shoeing had been done; that such employment was commonly known in the horse shoeing trade as "riding out the horses," and that this term was commonly used and recognized in the trade as describing the employment in which his brother was engaged. The plaintiff testified further that on the day preceding his arrest his father and the defendant had swapped horses; that the arrangements for the swap had been made at or near the shop; that he was present at the time; that the defendant went away after the terms of the swap had been arranged, telling the plaintiff's father to send the horse he had formerly owned to the defendant's barn and get from the defendant's wife a check representing the amount the defendant was to pay for the difference in value between the two horses and take away the horse which the defendant had owned; that this was done, the plaintiff's brother being sent to effect the exchange; that a little later the plaintiff was present when there was a conversation between his father and his brother, as a result of which the brother was sent for the second time to the defendant's barn, to re-exchange the horses; that he did not know

whether or not his father had seen the defendant or had any conversation with him previous to this re-exchange.

John McKenna, a witness for the defendant, testified that he was employed by the defendant as a teamster; that he was present when the plaintiff's brother brought the horse his father had owned to the defendant's barn and took the defendant's horse away; that later in the afternoon the same boy came back riding the horse which the defendant had previously owned and said to the witness, "There has been a mistake, my father and Mr. Dearborn [the defendant] have traded back and I have come to get our horse;" that the witness told the boy he could not take the horse until the witness had communicated with the defendant; that while the witness was in the house trying to get the defendant by telephone, the boy backed the horse which the defendant had received in exchange from Griffin, senior, out of the stall in the barn and was on its back when the witness came out of the house; that, when the witness attempted to stop him, the boy struck the horse with the halter and rode away; that the defendant returned later in the afternoon; that the witness told him that the horse had been taken away and in reply to Dearborn's question as to who took it, said, "It was Griffin's boy, the one who rides out the horses down at the shop."

The defendant testified that he had swapped horses on the afternoon of Saturday, March 81, with Thomas H. Griffin, the father of the plaintiff; that after the arrangements for the swap were made he instructed Griffin to send to the defendant's barn and make the exchange; that he did not agree afterwards to swap back, had no conversation again that day with Griffin, and did not see him again that day; that when he returned to his home in the afternoon he learned from McKenna that the horse he had received in exchange from the plaintiff's father had been taken from his barn; that McKenna told him that the boy who took the horse had made the statement that his father and the defendant had swapped back and that the boy had ridden the horse away in spite of McKenna's protest and opposition; that in answer to his question as to who it was who took the horse, McKenna replied, "It was Tom Griffin's boy, the one who rides out the horses down at the blacksmith shop;" that he did not himself know that Griffin had more than one son employed

at the blacksmith shop; that he then reported what had occurred at the police headquarters, which were situated across the road diagonally from Griffin's blacksmith shop; that on the following morning, which was Sunday, he went to police headquarters and talked with the deputy chief of police; that he told this official that he did not know the name of the boy who took the horse but it was the boy who "rode out the horses" at Griffin's blacksmith shop across the street; that the deputy chief directed him to the clerk of the Lynn Police Court, whose office was on the floor next above in the same building and that he sent an officer with the witness to the clerk's office; that in the presence of this officer he told the clerk that the horse had been taken from his barn; that he had given no authority for it being so taken. The clerk then asked him if he knew the name of the boy who took the horse and that he answered that he did not, but it was Griffin's son who rode out the horses from the blacksmith shop; that thereupon the officer who had accompanied him to the clerk's office said, "I know him, his name is Thomas;" that the clerk then filled out a complaint and handed it to the witness and asked the witness whether that was right and the witness said he supposed so, and signed his name and swore to it; that all of the complaint except his signature was filled in by the clerk; that on the Monday morning following the plaintiff's arrest the witness was sick in bed and unable to attend court; that he instructed his counsel to ask the court for a continuance of the proceedings till the following Thursday; that on Thursday he was at the court with the witness McKenna, prepared to testify for the prosecution; that McKenna after seeing the plaintiff in the court room said to the witness that there had been a mistake and the wrong boy had been arrested, as the plaintiff, the then defendant, was not the boy who took his horse, but his brother; that that was the first intimation the witness had received that any mistake had been made or that Thomas Griffin, senior, had two sons employed at the blacksmith shop; that the witness immediately instructed his counsel to ask the court for the plaintiff's discharge on the ground that there was no evidence to convict him, and that this was done.

The defendant was cross-examined as follows: "Q. You knew it was a serious thing to arrest a young man on a charge of lar-

ceny? A. I don't know that I asked anybody to arrest anybody. — Q. What were you going to do? A. I left it to them. — Q. You wanted them to if you didn't get the horse back promptly? A. Yes, sir. — Q. That is, it was either the horse or the body of the boy? A. Well, the horse or an equivalent. — Q. Or the boy? A. I wanted the horse. — Q. The horse, the money or the boy? A. No; I wanted the horse and would have taken the money."

The defendant, among other requests, asked the judge to instruct the jury as follows :

"10. That if the jury find that the defendant in this action acted under the advice of counsel or an attorney at law, in instituting the prosecution against the plaintiff, in the Lynn Police Court, then your judgment must be for the defendant.

"11. That the evidence offered by the plaintiff in this case fails to show lack of probable cause on the part of the defendant in instituting the prosecution complained of.

"12. Upon all the evidence in this case your verdict must be for the defendant."

The judge refused to give these instructions. The portion of the judge's charge which is material to the exceptions is described in the opinion.

The jury returned a verdict for the plaintiff in the sum of \$100; and the defendant alleged exceptions.

F. E. Shaw, for the defendant.

J. W. Sullivan, for the plaintiff.

SHELDON, J. The plaintiff had the burden of showing that the prosecution against him was instigated by the defendant both maliciously and without probable cause. The jury could have inferred the existence of malice from the absence of probable cause; but the latter must be affirmatively shown and cannot be inferred from the existence of malice. *Parker v. Farley*, 10 Cush. 279, 281. *Stone v. Crocker*, 24 Pick. 81, 84. *Wilder v. Holden*, 24 Pick. 8, 11. These fundamental principles are not disputed; but the defendant contends that there was not sufficient evidence to hold him and that the jury were not properly instructed at the trial.

1. There was evidence for the jury of the absence of probable cause. This issue becomes a question of law for the court only

when the facts bearing upon it are not in dispute. *Casavan v. Sage*, 201 Mass. 547. That was not the case here. The circumstances of the alleged larceny, as it is contended that they were reported to the defendant, did not exclude the hypothesis that the plaintiff's younger brother, in taking the horse from the defendant's stable, was acting under an honest claim of right in obedience to an order which he believed to have been rightfully given to him by his father. The jury could find, not only that this was the case, but that the defendant ought to have known it to be so, and to have seen that if the crime had been committed at all it was the father and not the son who was the guilty person. The defendant's immediate prosecution of the son without any precedent investigation of the grounds or reasons on which the latter had acted might be taken to indicate both that the defendant was actuated by malice and that he acted without any honest or well grounded belief that the person whom he intended to prosecute was guilty of the alleged crime. The defendant's own testimony on cross-examination could be found to support this view,—that he wanted the horse or an equivalent, that he wanted the horse and would have taken the money. The issues were for the jury.

2. The tenth request was properly refused. There was no evidence that the defendant had acted under the advice of counsel. It could be found that he did not honestly state all the facts that had come to his knowledge either to the deputy chief of police or to the clerk of the police court, and did not leave it to them to act on their own judgment and responsibility, and that neither of them advised him to make a criminal prosecution. On these findings, the case of *Burnham v. Collateral Loan Co.* 179 Mass. 268, gives him no comfort.

3. But we are apprehensive that the jury may have been misled by what was said in the charge to the jury. After giving instructions both as to probable cause and as to malice, and after having told the jury that the law would not protect the defendant if he had acted, though not from "black-hearted revenge," yet from "the desire to accomplish something . . . based upon sinister and bad motives and reasons," the judge said to them: "What was the motive which actuated him? . . . Was it love of justice? Was it love of self? If it was for justice on the facts of

this case there ought to be a verdict for the defendant. If it was love of self and he set this in motion because he had a bad and wicked heart toward people in general situated as this boy was, there should be a verdict for the plaintiff." This was a clear and plain direction to find for the plaintiff if the jury should find that the defendant had instituted the prosecution from malice. It is the winding up of the instructions upon the question of liability, and it had not been preceded by any equally clear and distinct statement that the plaintiff could not recover unless the absence of probable cause also was shown. As there was conflicting evidence, it may be that the jury rested their verdict entirely upon a finding of malice and either did not pass upon the issue of probable cause or found that question in favor of the defendant. Accordingly there must be a new trial.

We have not deemed it necessary to discuss most of the defendant's requests for instructions because they have not been specifically argued. What has been said covers all the material contentions that have been made. We find no other error than what has been stated.

Exceptions sustained.

MARGARET S. COATES, trustee, vs. EZRA LUNT & others.

Essex. November 8, 1911. — November 29, 1911.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DeCOURCY, JJ.

Equity Jurisdiction, To complete an imperfect exercise of a power. *Power*. *Trust*, Purchase of trust property by trustee. *Statute of Frauds*.

Where one, who by the provisions of a will is given property in trust with a power to convey it, makes an attempt to carry out a fixed intent to execute the power by a conveyance for a sufficient consideration and the attempt falls short of accomplishing the purpose by reason of some defect in the instrument of conveyance, the person, to whom the property was attempted to be conveyed, by a suit in equity may compel a complete performance of the power if no rights of other persons with superior equities have intervened.

By the provisions of a will several parcels of real estate were given to two sisters under a trust to pay the income to themselves during their lives, with remainders over to their respective children and with a power, if by reason of misfortune either of them needed more than her net share of the income, to sell any and all of the real estate and to convey it by good and sufficient deeds.

One of the sisters became needy and the two decided to sell one undivided fourth part of a certain parcel. To carry out their purpose the needy sister sold to the other sister her interest in the property, receiving \$1,250, which was the fair value of the property, signing before witnesses and giving to her sister an instrument reading as follows: "I have received \$1,250 from [my sister] in payment for the quarter interest in store number 33 Market Square which I own and relinquish to her." The writing was intended by both sisters as a valid and binding execution of the power in the will and was intended and was believed by them legally to vest the title in the sister to whom it was given. After the death of both of the sisters, one, who would have been entitled to the land if the conveyance had been made formally, brought a bill in equity against persons who under the will held the title to the land in the absence of a completed conveyance, and averred the foregoing facts. *Held*, that the plaintiff was entitled to relief in equity, since all of the elements existed which entitled the plaintiff to have the exercise of the power completed, and there were no rights of other persons intervening.

Where by the provisions of a will certain real estate was given in trust to two sisters to pay to themselves the net income thereof for their comfortable maintenance, with a power, in case either of them by reason of misfortune should need more than the net income, to sell the property at public or private sale, and one of the sisters comes to need more than her share of the net income, the other sister, if she pays an adequate price therefor, may purchase the needy sister's interest in a part of the trust estate without violating the equitable rule forbidding one who holds property in a fiduciary capacity from becoming a purchaser thereof.

The statute of frauds does not prevent the giving of relief in a suit in equity to compel the completion, by a formal conveyance of land, of an imperfect execution of a power under a will where there has been a valid sale of the land, the consideration has been paid, a receipt adequately stating the terms of the sale has been given by the intended grantor to the intended grantee, and both parties thought that the writing given was a sufficient formal conveyance of the property.

RUGG, C. J. This is an appeal from a decree * sustaining a demurrer and dismissing a bill in equity. The bill alleges that Mary S. Greenleaf by will devised real estate to her two daughters, Ellen M. Carter and Sarah C. Lunt and the survivor of them, in trust, to apply the net income thereof "to their own use and enjoyment in equal proportions during their natural lives, but should they or either of them by reason of misfortune need more than the net income thereof or her share thereof for their or her comfortable maintenance, in such case I hereby authorize and empower them as my trustees under this my will to sell and convey by good and sufficient deeds . . . by public or private sales, for such sums of money and to such person or persons as they may decide upon, any and all my real estate," with remainder of income, upon the decease of either, to her children,

* By Sanderson, J.

and remainder after decease of both to their children. During the lives of the daughters, Sarah "by reason of misfortune, needed more than the income of the estate" and the daughters decided to sell one undivided fourth part of certain real estate for her support. To carry out this purpose, the daughter Ellen paid to her sister Sarah \$1,250 for said interest, which was a fair price, and received from her an instrument of the following tenor:

"Newburyport.

"I have received \$1250. from Ellen M. Carter in payment for the quarter interest in store numbered 32 Market Square which I own and relinquish to her.

her

Sarah x Lunt,
mark

"Witness Jan. 17, 1905.

Margaret S. Coates
Mary F. Collins."

Thereupon Ellen had the use and enjoyment of the income of this quarter interest, and paid the repairs, insurance and taxes during her life. The bill further alleges that the writing was intended by the two daughters "as a valid and binding execution of the power in said . . . will . . . and was intended by and supposed by them to legally vest the title thereto in said Ellen M. Carter." Both daughters are now deceased, and this suit is brought by the trustee under the will of Ellen M. Carter against the children of Sarah C. Lunt, praying for a conveyance in due form of the undivided fourth of real estate described in the instrument.

It is plain that the will conferred upon the daughters as trustees ample power to convey the fee to the real estate, provided the income was insufficient for the support of either, and it became necessary to sell for their comfort, and they were made the judges of the necessity. Under the allegations of the bill, which in this discussion must be taken to be true, occasion existed for the exercise of the power, and it would have been possible for the trustees by proper instrument to have made a sale. The bill alleges an intent on the part of the trustees to exercise the power and a belief on their part that the paper signed by Sarah was a complete execution of the power, and a surrender of possession by Sarah to Ellen, who thereupon entered into control

and exercised the functions of ownership over the estate during her life.

Relief in equity is sought to perfect an execution of the power. Defective execution of powers constitutes a ground for equitable relief. The elements necessary for its exercise are that there should be a fixed intent to execute the power upon a sufficient consideration and an attempt to effectuate that intent, partial in its nature and falling short of accomplishing the purpose by reason of some defect in the instrument by which the attempt is made. Where these elements exist equity will compel complete performance of the power, provided no rights of other persons having superior equities have intervened.

All these elements and more are alleged in the case at bar. The necessities of the daughter Sarah required the execution of the power. There was an intent on the part of both the daughters to exercise the right of sale conferred by the will. The fair value of the property was paid by the testatrix of the plaintiff to her sister. There was executed and delivered an instrument which contained a description of the property sufficient for identification, and which, read in the light of the conditions under which it was executed and delivered, shows on its face, although in language of extreme informality, a belief that it constituted an execution of the power. The rational construction to give the instrument is that it manifests an intent to convey the fee of the property which could be conveyed only in execution of the power. It is difficult to attach any intelligent meaning to it except an attempt to execute the power. This interpretation is confirmed by the circumstances alleged, especially by the payment of a fair purchase price and by a change of possession and by an entry into occupation followed by the usual acts of ownership. Although the instrument is signed by only one of the daughters, and it may be assumed that a strictly legal execution of the power would have required the signature of both as the trustees, (*Morville v. Fowle*, 144 Mass. 109,) yet in equity the allegation that both intended it to constitute an execution of the power and supposed that it was such is sufficient. The omissions and incompleteness of this instrument are not of such a nature as to negative the inference that it was intended and assumed by all the parties to operate as a complete execution.

Hence there is no reason to deny equitable relief. The children of Sarah C. Lunt were given a vested remainder under the will of the testatrix, but it was liable to be divested by the exercise of the power for the purpose set forth in the will. Their rights as devisees were subject wholly to the necessities of either or both of the donees of the power. The written instrument was not a mere contract to execute a power at some time in the future, but was itself the evidence of an attempted execution of the power. Therefore, the bill shows no equity in the remaindermen superior, but in truth one subsidiary to that alleged to exist in the plaintiff.

It is urged that the attempted execution of the power, being by one of the trustees to the other, is obnoxious to the well settled rule that no one can be the purchaser of property held by him in a fiduciary capacity. But the donees of the power were not merely trustees, they were also the chief beneficiaries. When the occasion arose for the exercise of the power, the one whose necessities were thereby to be relieved became as to the share to be sold the sole beneficiary. There is no rule which prevents a trustee from dealing directly with the *cestui que trust*. If the transaction is fair and open and no advantage is taken, it will be upheld. *Brown v. Cowell*, 116 Mass. 461. The allegations of the bill are within this principle.

The statute of frauds is not applicable to the case of an executed contract. But even if that defense was open, the description signed by Mrs. Lunt was ample to satisfy the requirements of that act. The demurrer should have been overruled.

Decree reversed.

N. N. Jones, for the plaintiff.

E. E. Crawshaw, for the defendants.

CERILE LABONTE vs. ADALEN LABONTE.

Essex. November 8, 1911. — November 29, 1911.

123-461
241-432

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DECOURCY, JJ.

Marriage and Divorce. Practice, Civil, Hearing by judge without a jury.

Where, at the hearing of a libel for divorce on the ground of a desertion which was alleged to have occurred in Canada, it appeared that the parties were not married in this Commonwealth and never had lived together here, and the libellant contended that the court had jurisdiction because he had resided in this Commonwealth for five consecutive years last preceding the filing of the libel, a finding of the judge who heard the case that the court had no jurisdiction of the case because the libellant had not resided in this Commonwealth for five consecutive years last preceding the filing of the libel is a finding of fact which will not be reversed unless shown to be clearly wrong. Such a finding was held not to have been clearly wrong in the present case, where the libellant testified that at the time of his marriage he had lived in Canada and that during his alleged five years' residence in this Commonwealth he had been in Canada during two periods, one of five or six months and the other of two or three months, during which periods he had lived with and worked for his brother.

LIBEL FOR DIVORCE filed on March 6, 1911, the alleged ground for divorce being utter desertion for three consecutive years from December 1, 1908.

In the Superior Court the case was uncontested and was heard by *Brown, J.*, who dismissed the libel and at the request of the libellant reported the case to this court for determination. The report stated that the libellant "testified in substance that he left Canada some eight or nine years ago leaving his wife in Canada because she had deserted him there and was unwilling to follow him here; that he first came to Lynn where he worked about one year and after that came to Newburyport; that about three years before filing his libel he left Newburyport and went to Sherbrooke, Canada, where he lived with and worked for his brother for five or six months; that he then returned to Newburyport and got back his former job and worked about six months; that he then left Newburyport and went to Sherbrooke, living with and working for his brother again, this time for two or three months, when he again returned to Newburyport where he has remained to the present time; and that during all of the time since he first came to Newburyport, ex-

cepting the time spent in Sherbrooke, he has worked for the same employer. The case was uncontested, the libellee not appearing. When the libellant had finished his direct testimony I asked him whether when he went these two times to live with his brother in Sherbrooke he intended to remain in Canada and he answered, 'Yes, if I could get my wife to live with me there.' Afterwards in answer to questions by his counsel he said he didn't expect when he went to Sherbrooke that his wife would be willing to live with him in Canada and that he went to Canada because he was sick and could board there much cheaper than here."

The presiding judge ruled on the libellant's testimony that the court had no jurisdiction of the libel for the reason that the libellant had not lived in this Commonwealth for the five years last preceding the filing of this libel.

The case was submitted on a brief.

R. E. Burke & *E. E. Crawshaw*, for the libellant.

No counsel appeared for the libellee.

DECOUROY, J. The parties in this libel were residents of Canada when married there in 1890, and have never lived together as husband and wife in this Commonwealth. The judge of the Superior Court, on the libellant's testimony, ruled that the court had no jurisdiction of the libel and ordered it dismissed.

As the parties were not inhabitants of this State, and the alleged cause of divorce occurred in Canada the court had no jurisdiction to dissolve their marital relations unless the libellant had his domicile in this Commonwealth for five years last preceding the filing of his libel. R. L. c. 152, § 5. *Shaw v. Shaw*, 98 Mass. 158. *Ross v. Ross*, 103 Mass. 575. This question of domicile was one of fact to be determined by the trial judge and he has decided it adversely to the claim of the libellant. He finds that both the libellant and the libellee are now citizens of the Dominion of Canada. And his ruling that the court had no jurisdiction of the libel was based on the reason "that the libellant had not lived in this Commonwealth for the five years last preceding the filing of this libel." This we must construe to be an express finding of the fact.

Clearly we cannot say that the judge's ruling was wrong or that the findings on which it was based were not justified. The

libellant's domicil was in Canada at the time of his marriage and remained there unless and until he acquired one elsewhere. His residence in Massachusetts during the past five years was interrupted by two periods of residence in Canada, one for five or six months and the other for two or three months. Even assuming that he fully credited the libellant's testimony the judge might well find, upon the evidence, that the libellant's residence here, while his wife and relatives remained in Canada, was without an intent to abandon his legal domicil in Canada and establish a new one here.

Libel dismissed.

**JOHN FLAHERTY vs. BOSTON & NORTHERN STREET
RAILWAY COMPANY.**

Essex. November 8, 1911. —November 29, 1911.

Present: RUGG, C. J., HAMMOND, BRALEY, & SHELDON, JJ.

Evidence, Competency. Witness, Redirect examination. Practice, Civil, Exceptions.

At the trial of an action against a street railway corporation for personal injuries from being run down by a car of the defendant when the plaintiff was at work upon a highway as a laborer, a witness was called by the defendant who was on the front platform of the defendant's car when it struck the plaintiff. The plaintiff cross-examined the witness in regard to a paper signed by the witness on which he had filled in written answers to printed questions, but the plaintiff asked no questions in regard to the contents of the paper and did not call for the paper nor inspect it. On redirect examination by the defendant the witness testified that after the accident his name was taken by the conductor and that a few days later he received by mail from the office of the defendant a blank with printed questions, that he filled in the answers, signed the paper and sent it back to the defendant. The defendant then offered the paper in evidence. The plaintiff objected to its admission and stated that he should make no reference to it in his argument. The answers of the witness contained in the paper tended strongly to show that the plaintiff's injuries were due to his own negligence. The presiding judge admitted the paper under an instruction which did not forbid the jury to consider the statements which were prejudicial to the plaintiff. The jury returned a verdict for the defendant, and, on exceptions alleged by the plaintiff, it was held, that the admission of the paper was an error injurious to the plaintiff and that the exceptions must be sustained.

Upon a bill of exceptions alleged by the plaintiff in an action for personal injuries after a verdict for the defendant, it appeared that a paper injurious to the plaintiff had been admitted in evidence improperly, but the bill of exceptions contained no statement of the evidence given in behalf of the plaintiff nor any

statement that there was such evidence, and the defendant contended that the plaintiff could not have been harmed by the admission of the paper as there was nothing to show that he was entitled to have his case go to the jury. The bill of exceptions, however, showed that the judge gave instructions to the jury in a charge and contained a statement that "the jury found for the defendant." *Held*, that it must be inferred that the case was left to the jury, which was in effect a ruling by the presiding judge that there was evidence for the jury to consider in favor of the plaintiff as well as against him, and that the ruling properly could be considered by this court as showing that evidence for the plaintiff existed on which the ruling was based.

TORT for personal injuries alleged to have been sustained by the plaintiff on November 6, 1909, from being struck by a car of the defendant while the plaintiff was working as a laborer in repairing a public highway in Haverhill. Writ dated January 18, 1910.

In the Superior Court the case was tried before *Aiken*, C. J. One Sturtevant, who was on the front platform of the car at the time the plaintiff was struck, was called as a witness by the defendant, and was cross-examined by the plaintiff in regard to a paper containing printed questions and answers in writing which was signed by the witness but was asked no question in regard to the contents of the paper. On redirect examination by the defendant's counsel, the witness testified that after the accident his name was taken by the conductor and that a few days later he received by mail from the office of the defendant a blank with printed questions, that he filled in the answers, signed the paper and sent it back to the defendant. The defendant then offered the paper in evidence. The plaintiff's counsel objected to its admission and stated that he should make no reference to it in his argument. The defendant's counsel contended that, the plaintiff having cross-examined the witness in regard to the paper and having drawn out from him the fact that he signed the paper, it was competent for the defendant to show what the paper was. The judge admitted the paper and the plaintiff excepted. In the answers contained in the paper it was stated that when the accident occurred the witness was standing with the motorman, that the car was moving very slowly, that "the bell was ringing and the motorman was hollering." In answer to the question "Whom do you consider was to blame for the accident?" the witness had written "I couldn't tell." To the question "Give full account of the accident as witnessed by you"

the answer was written as follows: "The motorman noticed this man on the track and he slowed up and rang the bell until he got off, and didn't go any faster. I looked ahead again and saw him step back on the track again to level off some stone and the car was only about a dozen feet from him, and the motorman put on all his brakes, but it didn't do any good so he rang his bell and hollered at him, but he didn't seem to hear him, so he got struck by the car."

The Chief Justice said, "This is merely admitted for the jury to determine what influences may have operated upon this young man's mind. The witness's opinion as expressed in answer to that inquiry ['Whom do you consider was to blame for the accident?'] is immaterial."

The bill of exceptions concluded as follows:

"There was other evidence in the case which tended to prove that the defendant was not negligent and that the plaintiff was not in the exercise of due care at the time of the accident. No objection was made to those instructions in the charge that referred to the evidence objected to. To the ruling admitting as evidence the written statement of the witness Sturtevant the plaintiff duly excepted.

"The jury found for the defendant, and the plaintiff" alleged exceptions.

The case was submitted on briefs.

R. E. Burke & E. E. Crawshaw, for the plaintiff.

J. P. Sweeney & L. S. Cox, for the defendant.

SHELDON, J. The paper introduced in evidence by the defendant on the re-examination of its witness was incompetent. It is not contended that it was admissible on any other ground than by reason of the references made to it in the cross-examination of the witness. But the plaintiff's counsel had raised no question as to its contents; he had not called for it or inspected it; he disclaimed any intention of referring to it in argument. We have examined all the decisions relied on by the defendant's counsel, and none of them affords any authority for its admission under the circumstances of this case. See the discussions in *Boyle v. Boston Elevated Railway*, 208 Mass. 41, 43, and *Commonwealth v. Tucker*, 189 Mass. 457, 479, *et seq.*

The bill of exceptions recites that there was other evidence of

want of due care on the part of the plaintiff and of the absence of negligence on the part of the defendant, and does not show that there was any evidence in support of the plaintiff's case. Indeed, it sets out none of the evidence given in behalf of the plaintiff, either by recital or otherwise. For this reason it is contended that the plaintiff could not have been harmed by the admission of the paper, since there is nothing to show that he was entitled to go to the jury at all. It does appear however that the jury found for the defendant, and it does not appear and has not been suggested that the verdict was ordered by the judge. We must infer that the case was left to the jury and this was in effect a ruling, that there was evidence for the jury to consider in favor of the plaintiff as well as against him. This may be considered by this court, just as the statements made by the judge in his charge to the jury were considered in *Botkin v. Miller*, 190 Mass. 411, 415.

The contents of the paper tended strongly to show that the plaintiff's injury was due to his own negligence. We cannot say that he was not prejudiced by its admission; and what the judge said to the jury did not prevent them from considering the account of the accident given therein. The ruling that the jury could not consider the answer to one question contained in the paper, the answer to which could not affect the case, was not sufficient to prevent them from considering the highly prejudicial statements made in the other answers.

Exceptions sustained.

ADEN H. KELLOGG vs. BOSTON AND MAINE RAILROAD.

Essex. November 9, 1911. — November 29, 1911.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DECOURCY, JJ.

Practice, Civil, Exceptions. Pleading, Civil, Variance. Negligence. Railroad Carrier.

In an action of tort for personal injuries, where the presiding judge, at the request of the defendant, ruled that upon all the evidence the plaintiff could not recover and ordered a verdict for the defendant, upon the argument of exceptions alleged by the plaintiff it is not open to the defendant to contend that the verdict

was ordered properly because there was a fatal variance between the cause of action alleged in the declaration and the evidence, no question upon the pleadings having been raised by the ruling requested by the defendant on which the verdict was ordered.

In an action of tort against a railroad corporation for personal injuries sustained from the plaintiff's hand being caught by the door of a car swinging to and closing upon it as the plaintiff was about to alight from a train of the defendant on which he was a passenger, it appeared on the plaintiff's evidence that, when the train had come to a stop at the station where the plaintiff was to alight, the brakeman or the baggage master opened and pushed back the door of the car upon the metal catch, which closed and should have held it in place, that only one passenger, who did not touch the door, preceded the plaintiff in passing out and that as the plaintiff followed, although he did not come in contact with the door, it became unfastened and closed upon and injured his hand. It also appeared by the plaintiff's evidence that when the car stopped it was inclined somewhat away from the side on which the hinges of the door were placed, and the defendant contended that this tilting of the car created an unusual strain sufficient to explain the opening of the catch. *Held*, that there was evidence of due care on the part of the plaintiff, who had the right to assume that reasonable precautions had been taken to enable him to leave the car in safety, that the jury, in the light of their common experience and knowledge, could have found that unless the catch was in some way defective it would have worked properly, and that, if the defendant stopped the car for the discharge of passengers where there was such an inclination of the tracks that a due regard for the safety of passengers required that some additional precaution should be taken to prevent the unexpected closing of the doors after they had been opened and caught back, it was a question of fact whether the accident would have happened if this duty had been performed properly; so that the case was one for the jury.

TORT for an injury sustained on November 7, 1907, when the plaintiff was a passenger on a train of the defendant, from the plaintiff's hand being caught by the door of a car swinging to and closing upon it when he was about to alight from the train at the Franklin Park station of the defendant in that part of Saugus called Clifftondale. Writ dated February 15, 1908.

In the Superior Court the case was tried before *Lawton, J.* At the close of the plaintiff's evidence the defendant asked the judge to rule that upon all the evidence the plaintiff could not recover. The judge so ruled and ordered a verdict for the defendant; and the plaintiff alleged exceptions.

M. F. Cunningham, for the plaintiff.

D. E. Hall, for the defendant.

BRALEY, J. It is urged by the defendant that as the declaration contained no general allegation of negligence but only the specific averment that the defendant provided an insufficient

and improper door fastener, there was a fatal variance between the cause of action alleged and the proof. But no question of pleading was raised by the request on which a verdict was ordered in its behalf, and the question for decision is, whether there was any evidence which would have warranted a verdict for the plaintiff. *Ridenour v. H. C. Dexter Chair Co.* 209 Mass. 70, 78.

The plaintiff was a passenger and, when the train came to a stop at the station where he was to alight, the brakeman or baggage master announced the station, opened and pushed back the door of the car upon the metal catch, which closed and should have held it securely in place. In passing out but one passenger, who did not touch the door, preceded him, and as he followed and stepped over the threshold, the door, although he did not come in contact with it, unclasped and closing caught and injured his hand. It would follow that the plaintiff was injured while taking his departure under conditions established by the carrier, and had the right to assume that reasonable precautions had been taken to enable him to leave in safety, and if the accident happened as described by him, a finding that he exercised ordinary care would have been justified. *Carroll v. Boston & Northern Street Railway*, 186 Mass. 97. The defendant provided the device and used it while passengers were making their exit. The car was at rest, and there having been no unusual jolt or intervening cause ordinarily incident to this mode of travel which unloosed the door, the jury, judging from their common experience and knowledge, could have found, that unless the catch was in some way defective it would have worked properly and the door would not have instantaneously closed. *Silverman v. Carr*, 200 Mass. 896, 898. *Wadsworth v. Boston Elevated Railway*, 182 Mass. 572, 574.

But the defendant, relying on the plaintiff's evidence that when the car stopped it was somewhat inclined from the side on which the door was hinged, contends that this slight shifting of the centre of gravity created an unusual strain sufficient of itself to explain the mechanical action of the catch. Yet even then the sufficiency of the catch was a question of fact. *Carroll v. Boston Elevated Railway*, 200 Mass. 527, 536. The jury might have been satisfied that if suitable, it would not

have yielded to the strain, but still would have prevented the door from being easily moved. *Weinschenk v. New York, New Haven, & Hartford Railroad*, 190 Mass. 250. The defendant moreover had the absolute control of the movement of its passenger trains. If it chose to stop them for the discharge of passengers, where, because of the physical character of the location of the tracks, a due regard for their safety required that, when the train stopped and they were leaving the car, the doors, when opened and held back, should be so confined as to prevent their unexpectedly closing, it was a question of fact whether the accident would have happened if this duty had been properly performed. *Marshall v. Boston & Worcester Street Railway*, 195 Mass. 284, 287.

We are unable for these reasons to distinguish in principle the case at bar from *Silva v. Boston & Maine Railroad*, 204 Mass. 63, where our previous decisions bearing upon the questions raised are collected and reviewed.

Exceptions sustained.

JOHN INGRAM vs. EDWARD B. MARSTON.

Essex. November 9, 1911. — November 29, 1911.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DECOURCY, JJ.

Practice, Civil, Findings of trial judge, Exceptions.

Where, at the trial of an action of contract before a judge without a jury, the plaintiff introduces evidence of facts which entitle him to recover the full amount claimed by him, and the defendant, after testifying in direct contradiction to the plaintiff's evidence, asks the judge to find the facts in accordance with his testimony and on such facts to rule that the plaintiff cannot recover, if the judge, without passing expressly on the defendant's requests, finds for the plaintiff for the full amount of his claim, this necessarily implies that the judge did not believe the defendant's testimony and refused to make the finding and ruling asked for by him, and the defendant can have no ground for an exception.

DECOURCY, J. This was an action of contract by an attorney at law to recover for professional services and disbursements. The defendant left with the plaintiff some bills for collection and brought to his office a certain probate matter. It is agreed that the charges as set forth in the declaration were reasonable.

In direct contradiction to the plaintiff's evidence the defendant testified that the plaintiff agreed to accept a certain percentage of the amount recovered as full compensation in the collection cases; and that he never agreed to be responsible for the legal services in the probate proceedings. He requested the judge * so to find the facts, and in accordance therewith to rule that the plaintiff could not recover. Although the judge did not expressly pass on the requests, his finding for the plaintiff for the full amount of his bill necessarily implies a refusal to give them. And he was justified in such refusal, as evidently he did not credit the defendant's testimony.

The exceptions are frivolous and appear to have been intended for delay. Upon the motion of the plaintiff the exceptions are overruled with double costs and interest at the rate of twelve per cent from the date when the exceptions were allowed.

So ordered.

J. W. Morton & F. M. Furbush, for the defendant, submitted a brief.

T. S. Bubier, for the plaintiff.

JACOB COHEN vs. CHARLES T. JACKSON.

Essex. November 9, 1911. — November 29, 1911.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DeCOURCY, JJ.

Agency, Scope of authority, Ratification. Broker.

Where the owner of a parcel of land puts it into the hands of a real estate broker for sale with no instructions as to the price or terms of sale, such owner is not bound by an agreement in writing, signed by the broker as his agent, to sell the land for a certain price on certain terms, unless he ratifies the contract thus made in his behalf.

Where the owner of a parcel of land puts it into the hands of a real estate broker for sale with no instructions as to the price or terms of sale, and the broker without previous communication with the owner signs an agreement in writing as the agent of the owner to sell the land for a certain price on certain terms, taking from the proposed purchaser \$50 as a part payment of the purchase money, and afterwards the broker reports to the owner in substance the terms of the agreement of sale but does not inform him that he has made a con-

* *Bell, J.*, sitting without a jury.

tract in writing in his behalf or that he has received \$50 in part payment, an apparent acquiescence of the owner at that time can be found not to have been a ratification of the acts of the agent in making the sale, because the owner did not have a full knowledge of the facts.

BILL IN EQUITY, filed in the Superior Court on February 9, 1911, to compel the specific performance of an alleged contract to convey to the plaintiff a certain parcel of land in Lynn.

The alleged contract, of which a copy was annexed to the bill, was as follows:

“Lynn, Mass., Nov. 15, 1910.

“Received of Jacob Cohen of said Lynn fifty dollars, to be used in the purchase of that certain lot of land situate at the junction of Lander St. with Chestnut St. in said Lynn, belonging to Charles T. Jackson.

“Price of said lot not to exceed fifteen hundred and fifty dollars. In case of purchase, said premises to be conveyed by good title, by Warranty Deed, free and clear of all incumbrances and liens—including City of Lynn Real Estate Sewer and Sidewalk taxes, and any and all assessments. In case of purchase, the said Cohen is to pay two hundred dollars additional in money, and to give the grantor a mortgage for thirteen hundred dollars, for one year, with interest at five per cent. per annum, reserving the right and privilege however, of paying the whole of said principal sum at any time prior to the maturity of the mortgage note.

“Jerome Ingalls, Agent for Charles T. Jackson.”

The case was heard by *Hitchcock*, J., who made a memorandum of decision as follows:

“Some time in September of last year the land in question was put by the defendant into the hands of one Ingalls as a real estate broker for sale, under no special agreement. In November, the broker Ingalls did find a purchaser for the lot; that is, he had negotiations with the plaintiff, which negotiations, so far as Ingalls was concerned, culminated in the payment of \$50 by the plaintiff to Ingalls, and the giving to the plaintiff by Ingalls of the receipt and memorandum or so called agreement, a copy of which is annexed to the bill. Ingalls thereupon informed the defendant that he had sold the premises, and also informed him of the terms of the sale, and requested the defend-

ant to give him his deed of the premises ; which the defendant did. The defendant himself testified that he consented to take back a mortgage of \$1,300 at five per cent to run not longer than one year, and which, with the evidence on the part of Ingalls, leads me to find as a fact that Ingalls did inform the defendant at that time what the terms of the sale were, substantially as set forth in the agreement.

"I am unable to find that Ingalls informed the defendant that he had given a writing in the matter or that he had received \$50 as part payment, and Ingalls did not show to the defendant a copy of the agreement, which he says he kept and had on file in his office but did not have with him at the time he told the defendant that he had sold the premises. Matters ran along with no complaint or suggestion on the part of the defendant of any dissatisfaction in any way with the arrangement until February, at which time the defendant came to Ingalls and told him that he, the defendant, had sold the premises and requested the return to him of the deed of the premises which he had given to Ingalls, and the deed was then returned to the defendant.

"Upon these facts, which the court considers to be all the material facts in the case, certain questions appear to be raised.

"First. Was Ingalls authorized by his employment to give a contract or agreement in writing such as is relied upon in this case ?

"I find as a fact and rule as a matter of law that he was not authorized.

"Second. If he were not authorized by the terms of his employment to give such a contract, was the fact of such an agreement made by him with the plaintiff in this case communicated to and consented to or acquiesced in by the defendant ?

"The fact of such an agreement having been made by Ingalls was not communicated by him to the defendant, and the defendant had no such knowledge of all the circumstances relative thereto as would justify any finding that he consented to or acquiesced in or ratified the action of Ingalls in making such contract.

"Third. If Ingalls had authority to make such an agreement, was it such an agreement for sale as can be enforced in this proceeding ?

"In view of the findings and rulings already indicated it perhaps is not necessary to answer this question, but inasmuch as it was argued before me I find and rule that the agreement for sale is such in form that it could be enforced in this proceeding if the same were made by the authority of the defendant."

The judge made an order that the bill be dismissed, and later a final decree was entered in accordance with this order. The plaintiff appealed.

A. B. Tolman, for the plaintiff.

J. E. Odlin, for the defendant.

BRALEY, J. The executory contract for the specific performance of which the bill is brought is sufficient in form to satisfy the requirements of R. L. c. 74, § 1, cl. 4, but unless executed and delivered by the defendant's authority it cannot be enforced.

The defendant, who was the owner, employed one Ingalls, a real estate broker, to sell the property but no instructions were given to him as to the price or terms of sale. It was after negotiations by the agent with the plaintiff that a sale was effected and the contract in question, signed by the agent in behalf of the defendant, was delivered.

If it be assumed that the oral authority would have been sufficient to enable him to make a written contract or a memorandum for the sale of real estate as required by the statute of frauds, and to do all necessary acts connected with his employment which would embrace a sale as proposed, the evidence has not been reported, and, the judge having found "as a fact . . . that he was not so authorized," the finding should not be set aside, as it does not appear to have been plainly wrong. *Shaw v. Nudd*, 8 Pick. 9. *Duncklee v. Webber*, 151 Mass. 408. *Lobdell v. Baker*, 1 Met. 193. *Deane v. American Glue Co.* 200 Mass. 459. *New York & Colorado Mining Syndicate v. Fraser*, 180 U. S. 611. *Collen v. Gardner*, 21 Beav. 540. *Cohen v. Nagle*, 190 Mass. 4.

The plaintiff accordingly is forced to rely on the defendant's adoption of Ingall's acts. If ratification of the unauthorized acts of an agent by the principal appears, it is equivalent to original authority. *Bayley v. Bryant*, 24 Pick. 198. The findings of the judge, however, upon this question very plainly show, that while the defendant was put in possession of most of the

essential details of the transaction, he never was informed that the agreement had been reduced to writing or that a partial payment of the purchase price had been received from the plaintiff. It could become an existing and binding contract only upon the defendant's approval, not of a part, but of the entire instrument. *New England Dredging Co. v. Rockport Granite Co.* 149 Mass. 381. *Revere Water Co. v. Winthrop*, 192 Mass. 455.

The judge therefore properly ruled that the ratifier must be informed of all which had been done in his behalf, and that the omission of information as to these material particulars was fatal.

Decree affirmed.

**GLOUCESTER MUTUAL FISHING INSURANCE COMPANY vs.
AUGUSTUS G. HALL.**

Essex. November 9, 1911. — November 29, 1911.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DECOURCY, JJ.

Practice, Civil, New trial. Rules of Court. Notice. Words, "Delivery."

Rule 41 of the Superior Court, in regard to motions for a new trial in a civil action, does not apply to all motions for a new trial but only to motions for the causes mentioned in the rule, and, where on an exception to an order granting a new trial the bill of exceptions does not show on what ground the new trial was granted, the exception cannot be sustained on the ground that the notice of the motion for the new trial was not given in accordance with the requirement of Rule 41, because the new trial may have been granted by reason of an "accident, mistake or misfortune in the conduct of the trial," in which case the provisions of the rule have no application.

The requirement of Rule 41 of the Superior Court that, unless the court allows further time, the counsel of the party filing a motion for a new trial shall "cause a copy of the motion to be delivered to the adverse counsel on the day the same is filed," is complied with by depositing such notice in the mail on the day of the filing of the motion in accordance with the provisions of Rule 27 for serving a notice required by the rules.

CONTRACT for \$347.95. Writ dated January 16, 1909.

At the trial in the Superior Court before *King, J.*, the jury returned a verdict for the defendant. The plaintiff filed a motion for a new trial assigning five reasons for setting aside the verdict. At the hearing of the motion for a new trial the defendant asked the judge to rule that the court had no juris-

diction to hear the motion because of the plaintiff's failure to deliver a copy of the motion to the defendant or his counsel on the day the same was filed, and that, Rule 41 of the Superior Court not having been complied with, the motion should be dismissed. The facts in regard to the giving of notice are stated in the opinion. The judge refused to make the ruling requested by the defendant, granted the motion and ordered a new trial. The defendant alleged exceptions.

The material portions of Rule 41 and Rule 27 of the Superior Court are quoted in the opinion.

J. Cavanagh, for the defendant.

F. H. Tarr, for the plaintiff.

RUGG, C. J. A verdict was rendered in this case on May 31, 1910. The plaintiff filed a motion for a new trial on the following day, and deposited in the post office at Gloucester a copy of the motion with a notice stating that it had been filed that day, postage prepaid, and properly addressed to the defendant's counsel at his office in Boston, where it was delivered on the morning of June 2, two days after the return of the verdict. The question is whether this gave the Superior Court jurisdiction to pass upon the merits of the motion under Rule 41 of the rules of that court, whose material language is as follows: "No motion for a new trial shall be sustained . . . either on account of any opinions or decisions of the judge, given in the course of the trial, or because the verdict is alleged to be against evidence or the weight of evidence, unless within three days after the verdict is returned, the counsel of the party complaining . . . shall file a motion for a new trial . . . and cause a copy of the motion to be delivered to the adverse counsel on the day the same is filed or within such further time as the court may allow." No further time was allowed by the court in the present case.

The case could be decided on the narrow ground that as five causes for setting aside the verdict were assigned in the motion, the record does not show upon what grounds the verdict was in fact set aside. The excepting party does not make it appear that he has suffered injury, for the reason that Rule 41 does not apply to all motions for new trial, but only to those therein specified, and the judge may have granted this new trial on other

grounds, such as "accident, mistake, or misfortune in the conduct of the trial." *Ellis v. Ginsburg*, 168 Mass. 143, and cases cited at 146.

But the same result is reached upon broader considerations. A fair interpretation of the rules of the Superior Court leads to the conclusion that they were complied with. Rule 27 provides that "A notice required by, or given in pursuance of, these rules, shall be in writing, shall be served by delivering the same personally to the adverse party, or his attorney, or depositing it in the post office, directed to him, postage prepaid, . . ." It is to be noted that Rule 41 requires the motion "to be delivered to the adverse counsel," while Rule 27 speaks of "delivering the same personally." This has some tendency to indicate that "delivered," as used in the latter rule, standing alone, does not mean a physical passing into the hand of the adversary attorney, but may be satisfied by some action which falls short of a handing over to him personally. "Delivery" is variously defined by lexicographers as meaning: to give, to place in the power or possession of another, to part with to another, to make or hand over, to transfer, to pass to another, to communicate or to make known. As used in connection with the sale of chattels or transfer of title to property, the word "delivery" has been construed frequently by courts, and there have grown up at least two meanings in this connection, one actual or physical, and the other symbolical or constructive, transfer of property. It is plain, therefore, that "delivery" does not necessarily import an actual physical tradition of possession from one hand to another. The word is to be interpreted in accordance with the purpose to be accomplished by its use and the signification which would naturally attach to it in the connection in which it is found. As a practical matter, it would be in many instances a denial of the right to file the motion to construe the rule to mean that the copy of the motion must be put in the manual custody of the adverse counsel on the very day on which the original is filed in court.

It is common knowledge that attorneys frequently try cases in shire towns other than that of their residence or place of business, and in view of the limitations imposed by time and distance it would be often impossible to place the copy of the

motion in their hands on the day of its filing. It might be difficult also to reach any judge of the Superior Court in order to ask for an extension of time. The rule has the effect of a statute, and should be construed as a statute. But it should be interpreted as a usable regulation intended to reach reasonable results.

It is urged that, inasmuch as the words of Rule 41, "or within such further time as the court may allow," first appear in the "Rules of the Superior Court," which went into effect on the first Monday of July, 1906, there is an implication that the preceding words were intended to mean a physical delivery into the hand of the opposing attorney on the very day the motion is filed. While there is some force in this, the more rational inference is that this language was intended to give the court power in instances where there might be inconveniences in preparing a copy of the motion, or where other circumstances might require extension of the time within which it might be sent, rather than to produce the harsh effects which would flow from the adoption of the other construction contended for.

We are of opinion that the words, "cause . . . to be delivered . . . on the day the same is filed" occurring in Rule 41, mean a delivery on the day on which the motion is filed in such manner as notices are served ordinarily, and that depositing in the mail in accordance with the provisions of Rule 27 constitutes delivery. Thus interpreted, the rule is feasible, and will produce reasonable results. *Blair v. Laflin*, 127 Mass. 518. The other interpretation would make it a pitfall, and not an instrumentality of rendering justice.

Exceptions overruled.

BENJAMIN BAUM vs. EMILY B. AHLBORN.

Essex. November 9, 1911. — November 29, 1911.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DECOURCY, JJ.

231-58
233-1239
234-1435

Landlord and Tenant. Negligence, Of one owning or controlling real estate. Elevator.

An employee of a subtenant of a part of a floor of a building, in which there is a freight elevator for the use of tenants, who operate it in the transportation of materials, cannot recover from the owner of the building for an injury caused by the elevator not resting evenly on the floor of the well before being started, if at the time of the accident the construction and the condition of the elevator were the same that they were and appeared to be when the employer of the person injured became a subtenant in the building, and if the uneven resting of the elevator was due to rubbish or waste allowed to accumulate beneath it by the tenants without fault of the owner of the building.

TORT for personal injuries, resulting in the loss of a part of the thumb of the plaintiff's left hand, sustained on March 9, 1911, in a freight elevator in the building numbered 2 on Box Place in Lynn, owned by the defendant. Writ dated May 15, 1908.

In the Superior Court the case was tried before *Harris, J.* The plaintiff put in evidence the answers of the defendant to interrogatories filed by the plaintiff, and called as witnesses one Gardiner, the tenant of the whole building, who is referred to in the opinion, and one Green, the engineer of the building, employed by the defendant. At the termination of Green's testimony, the plaintiff, at the suggestion of the judge, made an offer of proof covering the rest of the evidence on which he relied. The facts which could have been found upon the evidence introduced and offered by the plaintiff are stated in the opinion.

At the close of the plaintiff's offer of proof the judge ordered a verdict for the defendant; and the plaintiff alleged exceptions, which after the resignation of *Harris, J.*, were allowed by *Pierce, J.*

A. T. Johnson, for the plaintiff.

G. E. Kimball, for the defendant.

BRALEY, J. The defendant is the owner of a building, in which is a freight elevator for the use of tenants, and in the

transportation of materials it was operated by the tenants who rode up and down upon it with the freight. On the day of the accident the plaintiff, accompanied by one of his employers, entered the car and, while he was adjusting a lifting bar which he carried, a slight movement of the elevator followed. To avoid a fall, he involuntarily reached out his left hand and, in some way not clearly described, his thumb passed in between the lifting pin and the plate under the cross beam, and, the elevator being simultaneously started by his employer, the thumb was crushed to the first joint. The jury could have found that if the car had rested evenly on the floor there would have been no space between the pin and the plate, and that the hoisting cable would not have tightened causing the lifting tongue to be drawn up.

If it be assumed that the posted notice that the elevator was not in repair referred to a defective car, formerly in use but which had been replaced by the new car then in operation, and that the evidence offered by the plaintiff would have warranted a further finding that he was not careless, yet he could not recover without proof that his injury was caused by the defendant's negligence in the discharge of some duty which she owed him.

The entire building had been leased to one Gardiner for a term of years, and upon its expiration he continued in occupation as tenant at will, and sublet a part of the third floor to Kenney and Besant, the plaintiff's employers. The lease contained no reference to the elevator, yet under the demise, as well as under the tenancy at will, it was oiled and kept in repair by the engineer in the defendant's employ, who had charge of the engine and boilers of the steam plant, and the engine and elevators in the building. It was a question of fact, in view of her admission in answer to the interrogatories and the testimony of the lessee and the engineer, whether the defendant retained control, or whether the making of repairs and supervision of the engineer were mere voluntary acts for the accommodation of tenants. *Kearnes v. Cullen*, 183 Mass. 298. The evidence that she had procured a policy of insurance indemnifying her against liability for accidents, and had made changes in construction after the accident also was competent for this purpose. *Perkins v. Rice*, 187 Mass. 28, 30. *Readman v. Conway*, 126 Mass. 374. But its exclusion did not harm the plaintiff. The evidence, even when viewed

in the light most favorable to him discloses no alleged defects which were not obvious, and no change in the condition or construction of the elevator at the time of the accident which did not exist when the building was let.

The accumulation of waste or rubbish on the floor of the well, which prevented the car from exactly resting in the position designed, even if contributing to the accident, formed no part of the construction, nor did it appear that the defendant was responsible for its deposition, which had been caused solely by tenants.

The plaintiff of course possessed no higher rights than the subtenants by whom he was employed, and as they hired the premises with an elevator thus constructed and operated, the defendant was under no obligation to them or their employees to make changes. *Freeman v. Hunnewell*, 163 Mass. 210. *Miles v. Janvrin*, 200 Mass. 514. *Nash v. Webber*, 204 Mass. 419. *O'Malley v. Twenty-five Associates*, 178 Mass. 555, 558.

Exceptions overruled.

CARY BRICK COMPANY vs. MORRIS WHEELER & another.

Suffolk. November 13, 1911. — November 29, 1911.

Present: RUGG, C. J., HAMMOND, SHELDON, & DECOURCY, JJ.

Bills and Notes. Payment. Evidence, Presumptions and burden of proof.

Where, upon a petition to enforce a mechanic's lien for materials alleged to have been furnished for the construction of a certain building, it appears that the materials were furnished as alleged, and the respondent asks to be credited with the amount of a promissory note given by him to the petitioner but never paid, the burden of proof is upon the respondent to prove the payment alleged by him, and this burden is not shifted by showing that the note was given for the amount of the alleged payment.

The presumption of fact, which exists in this Commonwealth, that a negotiable promissory note given for an unsecured simple contract debt was given and taken in payment of that debt, is not to be extended as of course to the case of a debt secured by a lien.

PETITION, filed on May 23, 1910, to enforce a mechanic's lien in the sum of \$1,247.73 for brick furnished and actually used in the erection of certain buildings at the corner of Huntington

Avenue and South Huntington Avenue in that part of Boston called Roxbury.

In the Superior Court the case was tried before *Hardy, J.* The only issue submitted to the jury was as follows: "What is the amount due the petitioner for material furnished by it for the construction of the buildings located on the lot of land described in the petition?"

The undisputed evidence introduced at the trial showed that the materials were delivered for the amount as found due. On January 8, 1910, and while the materials were being delivered the respondent gave the petitioner his note for \$845.50 payable in two months to the order of the petitioner. When the note came due on March 8 the respondent did not pay it. He then gave the petitioner a new note payable in thirty days to the order of the petitioner for \$858.22, which was the amount of the old note with interest. This note was not paid.

At the trial the petitioner produced both notes in court and tendered them to the respondent, who refused to accept them, and both notes were left in the custody of the court, where they remained.

The respondent offered no testimony. He asked the judge to rule and to instruct the jury that the note should be credited to him *pro tanto* and that the jury should be directed to answer the issue in the sum of \$402.78, that being the amount of the indebtedness less the amount of the note.

He also asked the judge to rule and to instruct the jury that the delivery of the note raised a presumption of payment *pro tanto*, and that the burden was on the petitioner to rebut the presumption; that, not having introduced any evidence to rebut the presumption, the petitioner was entitled to maintain his lien only in the sum of \$402.78.

The judge refused to make either of these rulings. He instructed the jury that the burden was on the respondent to show that the note was payment *pro tanto*, and, among other instructions, further instructed them as follows: "Now, you have a right to consider the circumstances in this case because of the fact that there was a claim on the lien. A lien may be considered as a security. Supposing a person has a mortgage note and he has it secured by a mortgage, the question would arise

whether he would consider the mortgage of more value than the note itself; would he look to the security of that mortgage in order to get payment of the note, or would he look to the personal liability of the party who signed the note; which would be the natural inference that you would gather from his taking the mortgage?" The respondent excepted to this portion of the charge.

The jury answered the issue by naming \$1,247.78, the full amount claimed. The respondent alleged exceptions.

J. Isaacs, for the respondent Wheeler, submitted a brief.

A. Berenson, for the petitioner.

SHELDON, J. The only questions presented are whether the promissory note given by the respondent to the petitioner was presumed to be a part payment of the petitioner's demand, whether such a presumption had been rebutted, and whether the amount due to the petitioner should be reduced by the amount of the note. This note and one given in renewal thereof were not paid; and they were tendered to the respondent at the trial, and on his refusal to accept them were left in the custody of the court.

The instructions given to the jury were sufficiently favorable to the respondent, and the rulings requested by him, so far as they were inconsistent with those instructions, were properly refused.

The burden was upon the respondent to prove the payment which he alleged, and this burden was not shifted by proof that he had given to the petitioner a note for a part of what was due. It is true in this Commonwealth that a negotiable promissory note given for an unsecured simple contract debt is deemed to have been given and taken in payment of that debt. But this is merely a presumption of fact, not to be applied as of course to the case of a debt secured by any kind of pledge or lien. *Brewer Lumber Co. v. Boston & Albany Railroad*, 179 Mass. 228, 284, *et seq.*, and cases there cited. "The fact that the result of giving effect to the presumption will be to deprive a party, in a given case, of security which he has for the payment of his debt, will go a long way towards rebutting the presumption." *Pad-dock & Fowler Co. v. Simmons*, 186 Mass. 152, 153. *American Malting Co. v. Souther Brewing Co.* 194 Mass. 89, 94. This is

the rule stated in *O'Conner v. Hurley*, 147 Mass. 145, 149, 150, relied on by the respondent.

There is no foundation for these exceptions, and they must be overruled with double costs.

So ordered.

MICHAEL MEYSHT vs. BOSTON ELEVATED RAILWAY COMPANY. 236-'394

Suffolk. November 15, 1911. — November 29, 1911.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DECOURCY, JJ.

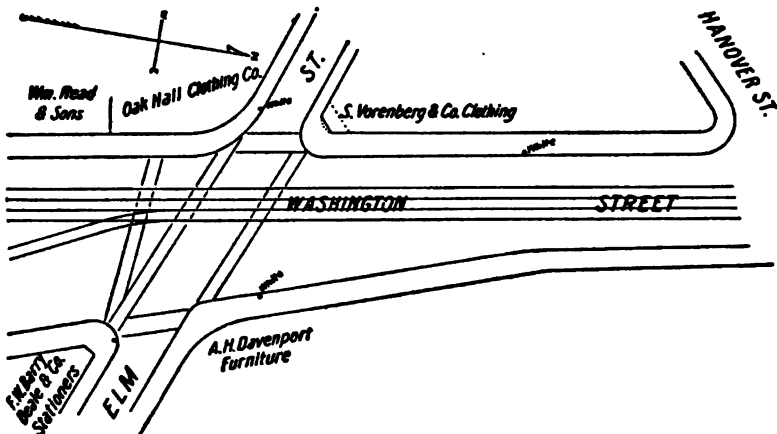
Negligence, In use of highway.

If a traveller on foot, when about to cross a city street in which there are double tracks of a street railway, looks along the tracks and sees a car approaching at an apparently safe distance from him but does not look into a cross street from which a team is coming, and this team turning from the cross street and passing in front of him after he has crossed the farther track of the street railway bars his way, so that, although he steps away from the rail and as close to the team as possible, he is struck by the car, in an action against the corporation operating the street railway for his injuries thus caused, it is not to be ruled that his failure to look into the cross street was negligence as matter of law, and the question of his due care is for the jury.

TORT for personal injuries alleged to have been sustained by the plaintiff at about five o'clock on the afternoon of January 16, 1907, from being run into by a car of the defendant while the plaintiff was crossing Washington Street in Boston upon a cross walk at its junction with Elm Street. Writ dated February 26, 1907.

In the Superior Court the case was tried before *Dana, J.* A reduced copy of a portion of a plan used at the trial is printed on page 842. The plaintiff testified that he came from the North Station and had walked south on Washington Street on the left hand sidewalk; that, when he came to Elm Street, he left the sidewalk, turned to his right and walked across Washington Street on the middle cross walk; that, when he came to the north bound track of the defendant, he looked both ways and saw a car coming from the south; that he stopped for a minute and let that car go by; that he then started to cross the tracks

and when he was between the two tracks he looked north again and saw a south bound car about two hundred feet away, that is, down on Hanover Street, and he walked on to cross the south bound track; that, when he was in the middle of that track, he looked north again and that car was then about one hundred feet away, coming on the south bound track; that, when he stepped over the farther or westerly rail of that track but was within a foot of it, a long, single team — not a buggy — came very fast from Elm Street around the corner into Washington Street, going south, and blocked his going ahead; that he then stopped a second or two, keeping his eye on that car which was then about thirty-five feet away, and he stepped westerly as far away from



the rail as possible and as close as possible to the team, so close in fact that it brushed his clothes; that the car came "pretty fast" and struck his legs and threw him down; that when he saw the car the first and second times it was "coming pretty fast," how fast he couldn't say; that when he saw it the third time, before it hit him, he had stepped over the farther rail; that, when the car hit him, the hind wheel of the team had not gone by him; that when the car and team were so coming, he tried to but could not go any farther than to step close to the team; that, just before he was hit, he saw other teams in the street coming along and there was a car going north behind him, the bell of which was rung; that he was walking a middling gait, "no run and no slow."

On cross-examination he testified that the electric lights were on and he could see plainly where the accident happened; that his eyesight and hearing were good and he was an active, well man; that he often had been over and was perfectly familiar with Washington Street before the accident; that he knew that cars ran on those tracks in both directions and were likely to go any time either way; that when he crossed over, it was to look for some lunch room; that he was alone and in no hurry and nobody crossed just ahead of him; that he went right across the tracks after the north bound car had gone by him two or three feet; that that car kept constantly moving; that the first he saw of the car that hit him was when he was between the two tracks; that it was then moving and kept on moving toward him until it struck him and that it was after he saw it so moving that he stepped on to the south bound track, but he did not at that time see that team nor until it swung around into Washington Street, although he saw other teams in the street; that he saw the team before it got in front of him; that Washington Street is a straight, wide street at this point and any one at Elm Street can look north or south and see several hundred feet in either direction; that it was light enough to see perfectly in that locality and there was a little snow on the ground; that when he first saw the horse it was not far away, three or four feet; that when the car was one hundred feet away, he did not see the horse anywhere and he was only "looking to the car" at that time; that that team was the only one right in that neighborhood.

There was evidence that the defendant's car was going fifteen or eighteen miles an hour and did not diminish its speed at any time until it struck the plaintiff; and that after striking him it went about one and one half car lengths. The plaintiff introduced in evidence the ordinances of the city of Boston regulating the speed of street cars, which it was agreed might be referred to.

At the close of the plaintiff's evidence the judge ordered a verdict for the defendant; and the plaintiff alleged exceptions.

E. Greenhood & S. L. Bailen, for the plaintiff, were not called upon.

R. A. Stewart, (*E. S. Kochersperger* with him,) for the defendant.

SHELDON, J. The jury might have found that the accident in which the plaintiff was injured was due to negligence in running the defendant's car. This is not denied. The only contention made by the defendant's counsel is that on the evidence the jury would not have been warranted in finding that the plaintiff was in the exercise of due care.

We cannot agree with this contention. The plaintiff looked along the defendant's tracks before attempting to cross the street, and saw that the car was at an apparently safe distance from him. He was correct in his judgment and would have crossed without harm had not a team turned in from a cross street and passed in front of him. He was not bound as matter of law, whatever the jury might have found as matter of fact, to look into the cross street and wait until there was no possibility of such an event as happened. When he found himself thus pocketed between the defendant's farther track and the unexpected obstacle, it may have been wiser and less dangerous for him to stop where he was (as in *Magner v. Boston Elevated Railway*, 209 Mass. 60) than to return over the defendant's other track and the rest of the street to his starting point. At any rate this was for the jury to say. The cases relied on by the defendant do not support its contention.

Exceptions sustained.

PATRICK O'MALLEY vs. NEW YORK, NEW HAVEN, AND
HARTFORD RAILROAD COMPANY.

Suffolk. November 17, 1911. — November 29, 1911.

Present: RUGG, C. J., HAMMOND, BRALEY, & SHELDON, JJ.

Negligence, Employer's liability.

Where an employee of a railroad company, while at work helping to unload a vessel which the railroad company neither owned nor had anything to do with except to unload it after it had been made fast by the vessel's crew at a dock of the railroad company, was injured by the fall of a piece of iron which was a portion of a hatch combing, a part of the vessel, and it does not appear what caused the iron to fall nor that the railroad company or any of its employees knew or ought to have known that there was any danger that it would fall, the railroad company is not liable for such injuries either at common law or under R. L. c. 106, § 71.

TORT for personal injuries received by the plaintiff while in the employ of the defendant as stated in the opinion, the declaration containing a count at common law alleging as the cause of the injury negligence of the defendant in setting the plaintiff at work in a dangerous place without proper warning, a count under R. L. c. 106, § 71, cl. 1, alleging as the cause of the injury a defect in the ways, works or machinery of the defendant, and a count under clause 2 of the same section of the statute alleging negligent superintendence as the cause of the injury. Writ dated May 14, 1908.

In the Superior Court the case was tried before *Lawton, J.* The facts are stated in the opinion. At the close of the evidence by agreement of counsel the presiding judge ordered a verdict for the defendant and reported the case for determination by this court, it being agreed that, if his ruling was wrong, judgment should be entered for the plaintiff in the sum of \$500; and that if his ruling was right, judgment should be entered for the defendant.

L. S. Thierry, for the plaintiff.

J. Wentworth, for the defendant.

RUGG, C. J. This is an action of tort for personal injuries with counts at common law and under the employers' liability act. The plaintiff was put at work unloading coal from a vessel which had been made fast by its crew at the defendant's dock. The defendant did not own the vessel, and had nothing to do with it except to unload the coal. The plaintiff was injured by the fall of a piece of iron, which was a portion of a hatch combing, a part of the vessel, and a protection of its hatches. There is nothing to show what caused the iron to fall. If it be assumed that it was defective, this was a defect in the ship, for which under *Hyde v. Booth*, 188 Mass. 290, and decisions there cited, the defendant was not responsible. It was the defendant's duty to warn the plaintiff of any danger of which it knew and of which he was ignorant and ought not to be assumed to have known. But there is nothing here to show that the defendant or anybody in its employ had knowledge of the danger which caused injury to the plaintiff. *Hughes v. Malden & Melrose Gas Light Co.* 168 Mass. 395.

The case appears to be indistinguishable in its facts from

Dunn v. Boston & Northern Street Railway, 189 Mass. 62, and *Hyde v. Booth, supra*. It is not like *Crimmins v. Booth*, 202 Mass. 17, where by contract the defendant stevedore had such possession and control over the ship as constituted a temporary appropriation of it by him for the purpose of performing his agreement with the ship owner.

Judgment for the defendant.

BLANCHE M. POWERS vs. JOSEPH L. BERGMAN.

Suffolk. November 24, 1911. — November 29, 1911.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DECOURCY, JJ.

Practice, Civil, New trial.

A motion for a new trial on the ground of newly discovered evidence is addressed to the discretion of the trial judge, which is a judicial and not an arbitrary discretion. In the present case, which was an action for assault and battery, it was held that there was nothing in the record to show even unwise action of the trial judge in overruling such a motion.

RUGG, C. J. These exceptions relate to a refusal to grant a new trial on the ground of newly discovered evidence. The action is to recover damages for an assault. The affidavits indicate that the alleged newly discovered evidence tends to show that the defendant was at another place at the time of the assault. A motion for a new trial ordinarily is addressed to the discretion of the trial court, to the exercise of which no exception lies. Although it is a judicial and not an arbitrary discretion which must be exercised, in the present case there is nothing to indicate even unwise action by the trial judge.* The newly discovered evidence was itself of a character which may have failed to carry to his mind conviction of its truthfulness. He saw the witnesses on both sides during the trial, and having denied a motion for a new trial upon the usual grounds, may have been satisfied that, notwithstanding the new evidence, the verdict ought to stand. Even if the evidence, which has been discovered, would justify

* *DeCourcy, J.*

a different verdict, a motion for a new trial may be refused rightly. There is nothing in this record to support an exception to the discretion of the Superior Court. *Freeman v. Boston*, 175 Mass. 208. *Behan v. Williams*, 128 Mass. 866. *Parker v. Hardy*, 24 Pick. 246. In *Manzigian v. Boyajian*, 183 Mass. 125, which clearly is decisive of the present case, only the excepting party was heard.

These exceptions appear to be within the terms of R. L. c. 156, § 13. They are overruled and double costs are awarded against the defendant and interest at the rate of twelve per cent per annum from the time the exceptions were allowed.

So ordered.

E. F. McClennen, for the defendant.

J. J. Walsh, (*J. F. Lynch* with him,) for the plaintiff.

CHARLES Z. SOUTHARD & another, trustees, vs. ROXA S.
SOUTHARD & others.

SAME vs. SAME.

Suffolk. January 20, 1911. — December 8, 1911.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, SHELDON, &
DECOURCY, JJ.

Devise and Legacy, Vested interest. Trust, Termination, Restraint upon alienation.
Res Judicata. Judgment. Estoppel. Probate Court.

By the provisions of a will certain parcels of real estate were devised to trustees among other things to divide the net income therefrom into halves and to pay one fourth of one half to five designated grandchildren of the testator, and one of the other three quarters of this half to each of three of his children, and, on the termination of the trust in a certain way, the will read, "I give devise and bequeath said three estates," one undivided fourth to each of the designated children of the testator, "to have and to hold to them and their heirs and representatives," and one undivided fourth to the five designated grandchildren "the survivors and survivor of them in equal proportions one fifth part to each — or the whole to the last surviving one if but one should then survive. My meaning and intention being that my said grandchildren the survivors and survivor of them shall together take the same share or portion thereof as their late mother would have taken if living; to have and to hold the same to them and their heirs forever. In case at the time when said three estates shall become free of mort-

gage as aforesaid my said grandchildren shall all be deceased, I give, devise and bequeath said one fourth part in fee simple to the other devisees under this will, the survivors and survivor of them." A residuary clause gave the rest and residue of the estate to "the same persons and in the same proportions as I have given the three estates aforesaid . . . except . . . not to be in trust but an absolute bequest and devise." *Held*, that the interest of the children and grandchildren vested in interest at the death of the testator and was to vest in possession at the termination of the trust.

In a suit in equity for instructions brought in 1910 by trustees under a will proved in 1866, it appeared that by the provisions of the will three designated parcels of real estate, subject to mortgages which were described, were devised to trustees, and among the conditions of the trust were provisions, that the trust should not be terminated until "the mortgage now existing upon each estate respectively as aforesaid, and the mortgage or mortgages which may hereafter be put upon each estate respectively by my Trustees as hereinafter provided, if any, shall be fully paid and discharged," that one half of the net income from the estates should be set aside as a sinking fund to be applied "as soon as, and as often as the same can legally and properly be done, toward the payment and discharge of said mortgages," and that the trustees might rebuild, in case buildings on the estate were destroyed, or tear down and rebuild, and improve and repair at their discretion, and if necessary might further mortgage the estates for such purposes, and might re-mortgage in case the payment of any mortgage became necessary before its payment could be compassed by the sinking fund. The income, and the principal of the trust on its termination, were devised to certain persons in language which this court held to convey interests which vested in interest at the death of the testator. The provisions of the will had been carried out by successive trustees until a short time before the filing of the bill in the present suit. *Held*, that the termination of the trust was postponed until the payment and discharge not only of the mortgages originally upon the estates, but also of such mortgages as the trustees at any time subsequently in their discretion might place thereon, and therefore that the property was rendered inalienable for an unreasonable period and that the trust should be terminated.

Where trustees under a will, which provided that one half of the net income from the trust estate should be set aside as a sinking fund ultimately to be used to pay certain mortgages on the trust property, for at least twenty-five years in accounts filed in the Probate Court have treated as capital and not as income a share of the estate assigned to them by a former trustee, who also was a beneficiary of the estate, as security for a promissory note covering an amount of trust funds in the sinking fund misappropriated by him, and the beneficiaries have assented in writing to the accounts, and decrees have been made confirming all such accounts and also a decree has been made, from which no appeal was taken, confirming an account of the delinquent trustee filed by the executor of his will after his death, one who has succeeded to the interest of several of the beneficiaries who so assented to the allowance of the accounts is barred from maintaining, in a suit in equity by the trustees for instructions, that the share thus assigned to the trustees should have been treated by them as income in the sinking fund and used with its accumulations to discharge the mortgages.

TWO BILLS IN EQUITY, filed in the Supreme Judicial Court on October 6, 1910, by trustees under the wills of John Rayner and

of his daughter Harriott E. Edmands, both late of Boston, for instructions.

The will of John Rayner was proved on August 11, 1856. The first and second clauses dealt with formal matters. By the third clause three parcels of real estate in Boston, called respectively the "Crowninshield Estate," which was situated at the corner of Elm Street and Hanover Street, the "Odin Estate," situated on Hanover Street between Court Street and Elm Street, and the "Tufts Estate," situated on Union Street, Blackstone Street and North Federal Court, subject to mortgages upon them the amounts of which were stated, were given to trustees "To Have and to Hold the same to the uses and trusts following, namely:— to take charge of, superintend and manage said three Estates, keeping the same in suitable and proper repair, and to collect and receive the income and profits thereof; and after deducting therefrom all necessary outlays and expenses and a reasonable compensation for their services, to pay over one-half part of the net annual income thereof as follows, namely:— One fourth part of said half part to my Grandchildren, Harriet Elizabeth Edmands, Elleen Catharine Edmands, Thomas Franklin Edmands, Elizabeth Catharine Edmands, and John Rayner Edmands, children of my said son-in-Law, Benjamin F. Edmands, and my late Daughter Catharine Rayner Edmands, in equal proportions, — one fifth part to each; — my meaning and intention being that my said Grandchildren, the survivors and survivor of them shall together take the same share or portion thereof, as their late mother would have taken, if living, to be for their sole use and benefit during the continuance of these trusts."

The fourth clause of the will gave "Another fourth part of said half part to my daughter, Harriott Edmands Rayner Edmands, the present wife of . . . Benjamin F. Edmands." The fifth clause gave "Another fourth part of said half part to my son, John J. Rayner." The sixth clause gave "The remaining fourth part of said half part to my daughter, Frances Ellen Rayner."

The seventh clause of the will read as follows: "As it is my Will and direction that no one of said three Estates shall be at present divided or partitioned amongst the persons entitled thereto as hereinafter provided, but shall remain undivided until

the mortgage now existing upon each Estate respectively as aforesaid, and the mortgage, or mortgages which may hereafter be put upon each Estate respectively by my Trustees as hereinafter provided, if any, shall be fully paid and discharged, so that such Estate shall be wholly free from said incumbrances: Therefore, believing that my Estate will not be called upon to pay said mortgages until sufficient income shall be derived by my trustees under the following clause, — Now for the purpose of paying and discharging said incumbrances, it is my Will, and I hereby direct my Trustees to set apart the remaining half part of the net annual income of said three Estates as a sinking Fund, and to apply the same so soon as, and as often as the same can legally and properly be done, towards the payment and discharge of said mortgages; they having full power and authority to apply said half part of said income accruing from each of said Estates respectively towards the payment and discharge of the mortgage upon that Estate, or all said half part of said net annual income accruing from all said three Estates towards the payment and discharge of the mortgage upon any one of said three Estates, or part to one and part to another, as my Trustees shall think best for the interest of those entitled to said Estates as herein provided; said half part of said annual income to be safely and profitably invested by my Trustees from time to time until required for the aforesaid purpose, in such manner as they shall think best, except that they shall not invest in Railroad Stocks.”

The eighth clause of the will read as follows: “In case the buildings now standing upon said three Estates, or upon any one of them, shall be destroyed by fire or other casualty before the incumbrances thereon shall have been discharged, or if before that time by reason of decay or depreciation in value, or if for any cause, my Trustees shall deem it expedient and best for the interests of those entitled to said Estates as herein provided, to remove said buildings or any portion of them, and to erect others in their stead, or to make any improvements in or additions to the buildings now on said three estates, then my trustees shall have full power and authority so to do, and for the purpose of defraying the expenses of such erections, improvements or additions shall apply thereto such part of said last mentioned half

part of said net annual income as may then be on hand and unapplied towards the payment, and discharge of said mortgages, so far as the same may be necessary; and in case a further sum shall be required for that purpose, my Trustees are authorized and empowered to mortgage the Estate upon which said buildings shall be erected, or such improvements or additions shall be made, so far as may be necessary to raise such further sum, as fully and effectually as I myself could do, if living."

The ninth clause of the will read as follows: "In case the holder or holders of any or all of said mortgages upon said three Estates shall require payment of the same at maturity, or before they shall have been paid in the manner already provided, and shall be unwilling to await the payment of the same in the manner above provided, then my Trustees are authorized and empowered to mortgage the Estate or Estates upon which the mortgage or mortgages so required to be paid now exist, to raise such sum as may be required for that purpose; which last named mortgage or mortgages, or other mortgage or mortgages which may be given by my Trustees in place thereof, shall be paid and discharged in the same manner as is already provided for the payment and discharge of said original mortgages."

The tenth and eleventh clauses of the will provided that "When said mortgages upon said three Estates or any one of them shall have been paid and discharged in the manner before provided, so that said Estates, or any one of them shall be free from incumbrances, and this fact shall be made to appear by the accounts of my Trustees relative to said Estates, or either of them, duly and properly returned and filed in the Probate Office where my Estate shall be settled, then I give, devise and bequeath said three Estates and each of them as they shall respectively become free from incumbrance as before provided," one undivided fourth part to the grandchildren mentioned in the third clause, mentioning them again by name, to "the survivors and survivor of them, in equal proportions, — one fifth part to each, — or the whole to the last surviving one, if but one should then survive, — my meaning and intention being that my said Grandchildren, the survivors and survivor of them shall together take the same share or portion thereof as their late mother would have taken, if living; to Have and to Hold the same to them and their

Heirs forever. In case at the time when said three Estates shall become free of mortgage as aforesaid, my said Grandchildren shall all be deceased, I give, devise and bequeath said one fourth part in fee simple to the other Devisees under this Will, the survivors and survivor of them." The twelfth clause gave "Another undivided fourth part thereof to my Daughter, Harriott Edmands Rayner Edmands . . . to Have and to Hold the same to her and her Heirs and representatives forever; provided that should my said Daughter leave children or a child, the father of such children or child shall have no interest whatever in said one fourth part." The thirteenth clause gave "Another undivided fourth part thereof to my son, John James Rayner, to have and to Hold the same to him and his heirs forever;" and the fourteenth clause gave "The remaining undivided fourth part thereof to my Daughter, Frances Ellen Rayner; to Have and to Hold the same to her and her Heirs and Representatives forever," with an added provision of the same import as that in the twelfth clause.

The fifteenth clause is quoted in the opinion. The sixteenth to the twenty-first clauses contained pecuniary legacies and a specific bequest of personal property.

The twenty-second clause read as follows: "All the rest and residue of my Estate, real, personal and mixed, of which I shall die seized and possessed, or to which I shall be entitled at the time of my decease, I give, devise and bequeath to the same persons and in the same proportions as I have given the three Estates aforesaid, and subject to all the restrictions and reservations before mentioned, except that it is not to be in trust but an absolute bequest and devise."

The remaining clauses of the will related to formal matters.

The will of Harriott E. Edmands was proved on March 9, 1863. The first two clauses related to matters merely formal. The third clause gave to trustees all of the estate of the testatrix, real, personal and mixed, "and especially my undivided fourth part of three certain parcels of real estate," describing them, "devised to me" by the will of her father, the trustees to "collect and receive my share or portion of the net income of said Three parcels of real estate, as the same shall become due and payable under and in accordance with the provisions of said

Will," and to pay it to her husband during his life; "And in case the said three parcels of real estate, or any one of them, shall, during the natural life of my said husband, be and become free and discharged from the incumbrances thereon named in said Will in the manner therein provided," the trustees were directed to manage the interest which then would come to them, as well as the rest of the estate of the testator, and to pay the net income to her husband during his life.

By clauses four to seven inclusive, the trustees, if at the death of the husband of the testatrix the mortgages on the three parcels of real estate previously described, or any of them, had been paid off and the trust under the will of John Rayner terminated as to such real estate, were directed to divide the share thus coming into their possession into three parts, dividing one third among the same persons described in the third clause of the will of John Rayner, one third to John J. Rayner and one third to Frances Ellen Rayner. The exact wording of the fifth clause was as follows: "One undivided third part thereof to my nieces Harriett Elizabeth Edmands, Ellen Catharine Edmands, Elizabeth Rayner Edmands, and my nephews, Thomas Franklin Edmands, and John Rayner Edmands, children of my said husband and my late sister Catharine Rayner Edmands. The survivors and survivor of them in equal proportions, one fifth part to each, or the whole to the last surviving one, if but one should then survive; Provided however that if any one or more of my said nephews or nieces shall then have deceased having previously married and leaving a child or children then living, such child or children shall take the same share or portion as their deceased parent would have taken, if living, And if at the time when said three estates shall respectively become free of mortgage as aforesaid all my said nephews and nieces shall have deceased, leaving no child or children, I give and devise said one-third part in fee simple to the other devisees under this Will, the survivors and survivor of them."

By the eighth clause it was provided that, if at the death of the husband of the testatrix any part of the real estate still was held in trust by the trustees under her father's will, the income received therefrom should be divided into three parts by the trustees under her will and distributed "to the same persons or

their legally appointed Guardian or Guardians in the same proportions as I have given the three estates aforesaid, until said incumbrances shall be fully paid and discharged; upon the happening of which event I give, devise and bequeath said three estates to the same persons and in the same proportions and in the same manner as I have hereinbefore given said three estates;" and by the thirteenth clause of the will the residue was disposed of in the same manner.

Other clauses of the will related to formal matters.

Other facts are stated in the opinion.

The cases were consolidated and were reserved by *Brale*y, J., for determination by the full court.

The cases were argued at the bar in January, 1911, before *Knowlton*, C. J., *Morton*, *Loring*, *Brale*y, & *Rugg*, JJ., and afterwards were submitted on briefs to all the justices then constituting the court except *Loring*, J.

G. F. Williams, for Roxa S. Southard.

O. D. Young, (*W. E. Tucker* with him,) for Francis C. Welch, trustee under the will of Thomas F. Edmonds, and Horton Edmonds.

BRALEY, J. The trustees bring these petitions for instructions as to their respective duties under the wills of Harriott E. Edmonds and of her father, John Rayner. It is contended by the defendant, Roxa S. Southard, a great-granddaughter of the testator, who with the defendant, Horton Edmonds, a great-grandson, are his only surviving lineal heirs, that the trust created by John Rayner's will offends the rule against perpetuities, and also imposes an illegal restraint upon alienation, and, there now being no interests which have not vested or been determined, that it should be terminated and the property conveyed in fee.

The bulk of the testator's estate consisted at his death of three parcels of realty, each subject to a mortgage. In the third clause of his will he devised the equities to trustees to whom the petitioners have succeeded, and directed that the income and profits be collected, and after payment of all necessary outlays and expenses, with a reasonable compensation for themselves, one half of the net income thus ascertained should be paid in certain proportions to his children and grandchildren, who are specifically named, and the remaining half was to be

used in payment of the mortgages until they were extinguished. By the twenty-second or residuary clause, the residue of the estate was devised and given to "the same persons and in the same proportions as I have given the three estates aforesaid, and subject to all the restrictions and reservations before mentioned, except that it is not to be in trust but an absolute bequest and devise." Having created the trust he directs in the seventh clause, "that no one of said three estates shall at present be divided or partitioned amongst the persons entitled thereto as hereinafter provided," and then in the tenth, eleventh, twelfth, thirteenth and fourteenth clauses divides the principal subject to the trust into four parts, and names the grandchildren who are to take a quarter, and his son and two daughters who each take one of the remaining three quarters. We find no limitation over, and the rule of construction adopted in *Gibbens v. Gibbens*, 140 Mass. 102, 104, and affirmed in *Stanwood v. Stanwood*, 179 Mass. 223, and in *Minot v. Purrington*, 190 Mass. 336, 338, "that a vested remainder will be held to have been intended, in the case of a devise to the testator's children, unless there is something sufficient to show to the contrary," should be applied. The construction is not affected by the closing paragraph of the eleventh clause, that if when the trust ceased ". . . my said grandchildren shall all be deceased, I give, devise and bequeath said one-fourth part in fee simple to the other devisees under this will, the survivors and survivor of them." If the grandchildren all died the devise over to his children which in title was a vested interest depending upon a contingency would become a vested remainder to take effect in possession when the mortgages were paid. *Blanchard v. Blanchard*, 1 Allen, 223, 227. *Belcher v. Burnett*, 126 Mass. 230, 231. *Shaw v. Eckley*, 169 Mass. 119, 121, 122. *Heard v. Read*, 169 Mass. 216, 220. *Gilkie v. Marsh*, 186 Mass. 336, 341. *Clarke v. Fay*, 205 Mass. 223.

But, while the nature of their title has been discussed without reference to the provisions for the application of income in payment of the outstanding mortgages, the objects of the trust are so connected and interdependent that its character and validity are to be determined from all the language employed by the testator. We accordingly turn to the seventh, eighth, and ninth clauses of the will.

The seventh clause directs that the three mortgaged estates shall not be partitioned amongst the persons entitled thereto as "hereinafter provided, but shall remain undivided until the mortgage now existing upon each estate respectively," or mortgages given in substitution "shall be fully paid and discharged," and "now for the purpose of paying and discharging said incumbrances, it is my will, and I hereby direct my trustees to set apart the remaining half part of the net annual income of said three estates as a sinking fund, and to apply the same as soon as, and as often as the same can legally and properly be done, towards the payment and discharge of said mortgages." If this clause, with the fifteenth clause that "my children and grandchildren will not, I am sure, misunderstand my motive in making the foregoing provisions relative to said three estates, my sole object being to render the same of the greatest value to them, which end, I believe, will be best attained by a compliance with those provisions," are separated from the context, there would be ground for the argument urged by Horton Edmonds, that the testator's primary purpose was to provide for the payment of specific debts outstanding at his death so that his children and grandchildren might come into possession of unincumbered estates.

But the further provisions in the eighth and ninth clauses cannot be disregarded. By the eighth clause while the replacement of buildings which might be destroyed by fire or other casualty, and their preservation by suitable repairs from depreciation and decay may be treated as matters of necessary administration, the general authority empowering the trustees to erect in their discretion new buildings, and the placing of new mortgages to defray the expense, and by the ninth clause, that they may substitute new mortgages for a like amount to those in force at his death if the mortgagees demand payment, far exceed a direction to trustees to apply income in payment of designated mortgagees until their debts are extinguished. The trustees could reconstruct, improve and enlarge the buildings, and erect new buildings and mortgage the trust estate to pay for the outlay. The term, therefore, would end, and a conveyance under the tenth clause of the will could be made only when the mortgage debts thus created had been satisfied. It doubtless was the testator's intention, when the entire will is considered, to provide only for his chil-

dren and grandchildren. But if the devise of vested estates, and the language of the fifteenth clause, indicate that the testator intended that the devisees ultimately should come into possession with the power of absolute disposition, yet the prescribed period of redemption as expressed does not exclude the contingency that none of them might survive its termination. Whatever might have been accomplished by the consent of all parties, yet under the terms of the trust they could not compel the trustees to unite with them in a conveyance which would pass to the purchaser the legal and equitable title, or procure a discharge of the mortgages by payment of the principal. The purpose is not to enable the trustees to hold only the legal title, and to manage and preserve the estate, and pay the net income at stated periods to the beneficiaries until they reached a certain age, and then to convey to them in fee, or to whomsoever they might in writing appoint, or upon the decease of all of them, to distribute the property among their heirs at law to take by right of representation. *Sparhawk v. Cloon*, 125 Mass. 263. *Sears v. Choate*, 146 Mass. 395. *Clafin v. Clafin*, 149 Mass. 19. *Dunn v. Dobson*, 198 Mass. 142. See also *Lathrop v. Merrill*, 207 Mass. 6, 9. It was made their duty to preserve the property from foreclosure, and not to convey until the trust had been executed as the testator directed. The inhibition from making any conveyance of an estate in fee simple until the mortgages had been previously satisfied from income, rendered the property inalienable for an unreasonable period and the trust should be terminated. *Sears v. Putnam*, 102 Mass. 5. *Bartlett, petitioner*, 163 Mass. 509, 512. *Winsor v. Mills*, 157 Mass. 362. *Howe v. Morse*, 174 Mass. 491, 505, 506. *Brown v. Burdett*, 21 Ch. D. 667.

By the will of Harriott E. Edmands she devised her quarter share to trustees to hold until the trust in her father's will was determined. The equitable life estate given to her husband under the third clause, having fallen in by his death, and the trust having been ended, the fifth, sixth and seventh clauses disposing of the fee become operative. We are asked to construe the fifth clause which disposes of one third to her nephews and nieces, who are specifically named, and all of whom survived their aunt and uncle. But, as they took a vested remainder, whether the devise over to their unborn children is void for re-

moteness is of no consequence. *Cushman v. Arnold*, 185 Mass. 165, 168, 169. *Peabody v. Tyskiewicz*, 191 Mass. 317, 321. *Ball v. Holland*, 189 Mass. 369.

The children and grandchildren are deceased and it appears that by descent and devise Roxa S. Southard, Horton Edmands and Francis C. Welch as he is trustee under the will of Thomas F. Edmands have succeeded to the title of the original devisees, and there are no contingent interests. The trustees under the will of John Rayner are to convey the property to them discharged of the trust, to hold as tenants in common according to their proportionate shares, subject, however, to the mortgages on two of the parcels, the validity of which is not questioned. *Bowditch v. Andrew*, 8 Allen, 339. *How v. Waldron*, 98 Mass. 281. The undistributed net income, if any, accruing since the death of J. Rayner Edmands, or which has accumulated, pending the controversy, is to be divided among them in the same proportions.

The defendant, Roxa S. Southard further contends that "the termination of the trust, according to its terms, has been thwarted by the failure of the trustees to realize upon security belonging to the sinking fund, to wit, the assigned interest of John J. Rayner in the estate" and "that after his assignment, a proper administration of the trust would have annually turned into the sinking fund John J. Rayner's income therefrom." * Having been one

* The argument of the defendant Roxa S. Southard on this point, as stated in her brief, is as follows: "Upon this point, this defendant calls the attention of the court to the fact . . . that the present value of the one third interest of John J. Rayner in the trust estates is one third of the present net value of the estates, namely \$426,266.07, or \$142,088.89. The present outstanding mortgages are \$105333.33. Therefore the admitted present value of the security held in the trust fund by the trustees against the debt of a former trustee is \$37,000 in excess of the mortgages now outstanding.

"The debt of John J. Rayner was on December 31, 1875, \$44591.47.

"Assuming that the then beneficiaries had a right (which this defendant denies) to waive interest on this indebtedness up to December 2, 1881, it can hardly be questioned that from that time to the present such indebtedness should bear interest at the legal rate, and such interest from December 2, 1881 to December 2, 1910 amounts to \$77,589.16, making a total indebtedness from John J. Rayner belonging to the sinking fund of the John Rayner trustees of \$122,180.63.

"It is unquestionable that it was the duty of the trustees, immediately upon the assignment by John J. Rayner of his interest to secure his indebtedness, to realize upon the security and make good the depleted sinking fund."

of the original trustees, he appropriated while in office an appreciable part of the income, and pledged his share to replace the deficiency. But an examination of the instrument executed by him in connection with the conditions leading to the pledge, and the subsequent release of the accrued interest leaves no doubt as to the intention of the parties. The purpose was to protect the other beneficiaries from the loss which would ensue upon alienation by him of his share of the estate, and that either by will or upon intestacy his interest, which was more than sufficient to repay the indebtedness, should pass to them. John J. Rayner having died intestate, without issue, and his widow, who has since deceased, in consideration of an annuity for life having released her rights, the result desired was effected, and his share, having vested in the surviving beneficiaries as his heirs at law, was not converted into income but continued to constitute a part of the principal. *Pope v. Farnsworth*, 146 Mass. 339. *Preble v. Greenleaf*, 180 Mass. 79. It moreover having been thus treated by the trustees in their probate accounts with the assent in writing of the beneficiaries from whom she derives title, and of the mortgagees, for at least twenty-five years, the decrees passing and confirming their accounts, as well as the probate accounts of J. Rayner Edmands, who acted as one of the trustees presented by his executor, to which the parties did not assent but from which no appeal appears to have been taken, are conclusive and cannot be set aside or modified in these proceedings. *Bennett v. Pierce*, 188 Mass. 186. *Connors v. Cunard Steamship Co.* 204 Mass. 810.

The details and terms of the decree in each case are to be settled before a single justice. *Sears v. Hardy*, 120 Mass. 524, 542.

Decree accordingly.

COMMONWEALTH vs. SILAS N. PHELPS.

Franklin. December 14, 1911. — December 15, 1911.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, & SHELDON, JJ.

Practice, Criminal, Appeal.

Under R. L. c. 219, § 32, an appeal by the defendant in a criminal case from an order of the Superior Court imposing a sentence raises only the question whether any error of law is apparent upon the record.

INDICTMENT FOR MURDER, found and returned on July 12, 1910. The defendant was convicted of murder in the first degree, and a decision of this court overruling his exceptions is reported in 209 Mass. 396. After the filing of the rescript, the defendant filed a motion in arrest of judgment, which was denied. On appeal to this court, the order denying the motion in arrest of judgment was affirmed in a decision reported *ante*, 78.

In the Superior Court on October 25, 1911, *Fessenden, J.*, made an order imposing upon the defendant the sentence of death by means of a current of electricity, to be executed during the week beginning December 31, 1911.

From this order the defendant appealed.

R. L. c. 219, § 32, is as follows: "A defendant who is aggrieved by a judgment of the Superior Court which is founded upon matter of law apparent upon the record in any criminal proceeding, except a judgment upon a plea in abatement, may appeal therefrom to the Supreme Judicial Court."

No counsel appeared for the defendant and no brief was filed for him.

J. M. Swift, Attorney General, for the Commonwealth.

On December 15, 1911, the following rescript was issued by order of this court:

Appeal in criminal cases from the Superior Court to this court lies only for error of law apparent on the record. Plainly no error of law is apparent on this record. It follows that the sentence stands and is to be executed as if no appeal had been taken.

Judgment affirmed; sentence to stand.

HENRY BEDARD vs. NONOTUCK SILK COMPANY.

Hampshire. September 19, 1911. — December 28, 1911.

Present: RUGG, C. J., HAMMOND, LORING, & BRALEY, JJ.

Negligence, Employer's liability.

If a superintendent in a silk factory takes off the guard covering the rollers of a filling machine for the purpose of cutting off laps of silk which are clogging the rollers, and, after he has removed the silk, fails to replace the guard and, starting the machine, says to the workman who was operating the machine "All right; now go ahead," whereupon the workman, in proceeding to return to the machine, slips and gets his hand caught in the rollers, in an action by the workman against the proprietor of the factory for his injuries thus caused, there is no evidence of negligence of the defendant's superintendent in an act of superintendence, because the only act of superintendence was the decision to clear the machine at that time, which was not negligent, and the failure to replace the guard and starting the machine without it were merely defects in the manner of performing manual labor as a fellow workman of the plaintiff, the accompanying words "All right; now go ahead" being regarded as a part of such manual labor and not as words of command.

TORT for personal injuries sustained by the plaintiff on March 17, 1910, while in the employ of the defendant in its silk factory in that part of the town of Northampton called Leeds, from the plaintiff's hand being caught between the rollers of a filling machine by reason of the negligence of one Tower, alleged to be a person in the employ of the defendant whose sole or principal duty was that of superintendence, in having removed a cover or guard from the rollers and having failed to replace it, and in having informed the plaintiff that the machine was "all right" and having told him "to go ahead." Writ dated August 20, 1910.

In the Superior Court the case was tried before *Sanderson, J.* It was agreed by the defendant that Tower was in its employ and that he exercised superintendence. The plaintiff in his testimony described the accident in part as follows:

"I was running two machines. I had been running these machines a little over two weeks. When I started to run the machines, Mr. Tower showed me how to run them; he showed me how to put the laps on, showed me how to start it, and showed me how it stopped. The laps are the silk which is put

on and fed in from the back end of the machines, and taken out at the front end of the machine. That is what goes through the machine. When we started the machine, we pulled down the cover on the front of the machine which threw the belt on the tight pulley. The machine stopped automatically. There was a little catch on the end, it ran so long and would stop; it would run about two or three minutes I should think, when the cover would fly up and the machine would stop and the operator then took little sticks and removed the silk from the combs which are cylinders with wire teeth on, along on the front under the cover. I removed the silk by winding it on sticks; when I had done that, I pulled down the cover and started it again. I was tending two of those machines. Mr. Tower told me, if there were any laps on the rolls at the back end of the machine to tell him, and that he would cut them off; he didn't want me to cut them off; he would cut them off himself. The rolls are where the silk feeds in at the back end. If there were laps gathered on the rolls at the back end, it wouldn't make nice silk, it wouldn't fill out even and if it got lapped too much, it wouldn't run. There was a cover or guard over the rolls on the back end of the machine; the laps he told me not to take off are right under that; I never cut any laps off the rollers and I never removed the guard. Tower never said anything to me about the guard.

"The accident happened on the seventeenth of March, 1910, at about 7.30 A. M.; I started up my machine at 6.50 A. M. and I started in to work. I was working a while, I was working on one and took the silk off, and I started up the other and they ran together for a little while and one got blocked, what they called 'lapped.' The two machines were about two or three feet apart, I should think. I was working on the machine on the left hand side; I got hurt on the one on the right hand side; there was a large filling engine on the other side of the machine on the left towards the passageway to the boiler room. I took the silk off my machine nearest the passageway to the boiler room and then went to the other and put some silk on. . . . I took the silk off that, and that time it blocked up, as I told you, lapped and there was . . . one fellow came over, another fellow working side of me came over and looked at it, and Mr. Tower

came over and said . . . He said he would fix it himself and told us to go ahead, on the other machine. . . . We started to work on the other machine. He [Tower] went to work on the other one, and when he got through, he started it up and got it agoing. . . . Then he walked by the back end, and when he was going by, he said, 'All right ; now go ahead.' . . . He told me to go ahead, it was all right. Then I started that machine and took the silk off, and went to the other, and I got over there and my foot slipped, and my hand went in."

One Cherevette, called by the plaintiff as a witness, testified that he was working in the same room with the plaintiff on the day of the accident ; that he was working about ten feet away ; that he did not see the accident but that immediately after the accident he saw the cover or guard of the machine upon which the plaintiff was injured ; that the guard, when he saw it, was in the box on the front of the machine ; that he saw the guard about two or three minutes after the plaintiff got caught.

At the close of the plaintiff's evidence on the question of liability, the judge at the defendant's request ordered a verdict for the defendant ; and the plaintiff alleged exceptions.

W. J. Reilley, for the plaintiff.

F. F. Bennett, for the defendant.

HAMMOND, J. Even if it be assumed in favor of the plaintiff that the questions whether he was careful, whether the temporary absence of the guard was the proximate cause of the injury and whether there had been a sufficient compliance with the statutory requirements as to the time, place and cause of the injury were for the jury, there was still a fatal defect in his case. There was no evidence of any neglect for which the defendant is answerable.

No case was made out on the ground that at the time of the accident the machine was defective. The only trouble at the time of the accident was that the guard was not in place. It appeared that one Tower had taken off the guard for the purpose of cutting off the laps of silk which were clogging the rollers, and after he had removed the silk had failed to replace the guard. Tower was a superintendent, but we are of opinion that these were not acts of superintendence. In deciding to clear the machine at that time there was no negligence. It was

the proper thing to be done. The negligence, if any there was, consisted not in the decision of Tower as superintendent that the work should be done, but in the manner in which the manual labor was done by him as a fellow servant of the plaintiff in carrying out that decision. And so of the failure to replace the cover and of the act of starting the machine. The case stands in this respect with *Flynn v. Boston Electric Light Co.* 171 Mass. 395, and similar cases. See also for discussion of the principle involved, *McPhee v. New England Structural Co.* 188 Mass. 141, and cases cited on p. 144.

Nor can the words "It is all right, go ahead" be regarded as words of command under the circumstances. They were a part of Tower's work as a fellow workman. As stated by Holmes, J., in a similar case, they are "merely the assurance, in a customary colloquial form, of the fellow workman . . . [who had done the work] . . . that all was safe." *Whittaker v. Bent*, 167 Mass. 588, 590. See also *McDonnell v. New York, New Haven, & Hartford Railroad*, 192 Mass. 588. In no act of superintendence is Tower shown to have been negligent.

Exceptions overruled.

MOORE SPINNING COMPANY vs. BOSTON ICE COMPANY.

Middlesex. December 6, 7, 1910. — January 1, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, SHELDON, &
DECOURCY, JJ.

Negligence, In use of easement. *Easement*, Liability for negligent use of. *Practice*, *Civil*, Exceptions, Auditor's report. *Damages*, In tort.

In an action by a manufacturing company against an ice company, for damages from the washing away of a part of the bank of a canal maintained by the plaintiff, it appeared that the plaintiff had the right to draw water for its mills through the canal from a certain pond, but that this right was subject to the right of the defendant to cut and take ice from the pond and the canal, that six or seven years before the plaintiff acquired title to its mills the defendant caused a cut to be made in the bank of the canal at a point not far from the pond and built a runway for the purpose of sliding the ice down without lifting it over the bank, that, about two years after the plaintiff acquired title, about eighty feet of the bank of the canal at or near the cut was washed away by a sudden rise of water, causing damage to the plaintiff. The first count of the dec-

laration alleged injury from the making of the cut in the bank for the purpose of constructing a runway, without alleging negligence, and other counts alleged negligence in constructing and maintaining the runway. There was evidence as to the manner in which the cut was made and the runway was built and maintained. The presiding judge refused to instruct the jury that they must find for the defendant on the first count, but instructed them in substance, that the gist of the plaintiff's cause of action was negligence, that the defendant had the right to make the cut and build the runway, but was bound at its peril to see that due care was exercised in doing so, and that, if the washout was caused by negligence of the defendant in the construction and maintenance of the cut and runway and the plaintiff was injured thereby while in the exercise of due care, the defendant was liable. The jury returned a verdict for the plaintiff. *Held*, that, if the first count was defective in not alleging negligence and the instruction requested by the defendant in regard to the first count should have been given, no harm was done to the defendant by the refusal, as under the judge's charge the jury in finding for the plaintiff must have found that the defendant was negligent in making and maintaining the cut and the runway and that the washout and the damage to the plaintiff were due to such negligence.

In an action by a manufacturing company, having a right to maintain a canal to draw water for its mill from a certain pond subject to the right of an ice company to cut and take ice from the pond and the canal, against the ice company for alleged negligence in constructing and maintaining a runway through the bank of the canal for the purpose of sliding ice down, and thereby causing a part of the bank of the canal at or near the cut to be washed away by a sudden rise of water, whereby the plaintiff was put to expense in repairing the break and also was compelled to shut down its mill temporarily for want of water, the only evidence in regard to damages was that contained in the report of an auditor to whom the case had been referred. The auditor's report set out the different items of damage claimed by the plaintiff and what the auditor allowed under each and also set out what the contentions of the defendant were in respect to such items and how these contentions were dealt with by the auditor. The report concluded as follows: "I find that the defendant owes the plaintiff . . . the sum of \$7,061.68." The defendant asked the judge to rule that this statement in the auditor's report, "finding that the defendant owed the plaintiff a certain sum," was not evidence and should not be considered by the jury. The judge refused to make this ruling and instructed the jury as follows: "The mere fact that the auditor may have stated at the end of his report that the defendant owes \$5,000, or \$6,000, is not sufficient for you to make a finding upon in this case. You are to consider all the report; consider it in all its parts. It is not for you to select one or two sentences. I give you instruction on this point to deal with the whole report and see whether you are satisfied from that whole report that the evidence is sufficient to sustain the findings of the auditor." *Held*, that, even if the statement complained of was a conclusion of law rather than a summing up by the auditor and a finding of fact by him, which was not intimated, there was no error in the manner in which the matter was dealt with by the judge.

In an action by a manufacturing company, having a right to maintain a canal to draw water for its mill from a certain pond subject to the right of an ice company to cut and take ice from the pond and the canal, against the ice company for alleged negligence in constructing and maintaining a runway through the bank of the canal for the purpose of sliding ice down, and thereby causing a part of the bank of the canal at or near the cut to be washed away by a sudden rise of water, whereby the plaintiff was put to expense in repairing the break

and also was compelled to shut down its mill temporarily for want of water, the plaintiff, if it prevails, is entitled to recover for the loss of profits due to the interruption of the work of the mill caused by the washout and for the expense to which it was put in repairing the break in the bank of the canal and in securing a temporary supply of water.

MORTON, J. The plaintiff is the owner of mills in North Chelmsford and has the right to draw water for them through a canal from Newfield Pond so called. The defendant owns premises located on the shore of the pond and has the right to cut and take ice from the pond and canal, and the plaintiff's right to draw water is subject to the defendant's right to cut and take ice. The plaintiff can regulate at its mills the height and flow of water in the canal and does so as occasion arises. The defendant has no means of regulating the flow, and, so far as appears, has not claimed or exercised, and does not claim or exercise, any such right or privilege. The plaintiff acquired title in 1903. In 1896 or 1897, before the plaintiff acquired title, the defendant, for the purpose of facilitating the cutting and taking of ice, caused a cut to be made in the bank of the canal at a point not far from the pond and built a runway therein so as to enable it to slide the ice down to and load it in the cars without having to lift it over the bank. It is not contended that the defendant had any express license or permission from the plaintiff's predecessor in title to make and maintain the cut and runway. In December, 1905, about eighty feet of the canal bank was washed away at or near the cut by a sudden rise of water and the plaintiff was put to expense in repairing the bank, and was also compelled to shut down its mills temporarily for want of water. This action was brought to recover for the damages thus sustained. There are three counts in the declaration. The first count alleges in substance that the plaintiff had a right to use the canal for the purpose of conducting water from Newfield Pond to its premises and had a right to have the banks of the canal remain intact for that purpose, but that the defendant made a cut in the bank for the purpose of constructing a runway therein which caused the bank to give way and the plaintiff was thereby deprived of the use of the canal and was put to expense to repair the bank and obtain water and sustained other damages by reason thereof. The second count alleged that the defendant negligently constructed the runway,

and the third that it negligently constructed and maintained it. The case was sent to an auditor* who reported in favor of the plaintiff. There was a jury trial which resulted in a verdict for the plaintiff. The auditor's report was introduced in evidence. Numerous requests for rulings were presented by the defendant which were refused except so far as covered by the charge. The case is here on exceptions by the defendant to the refusal of the presiding judge † to give the rulings requested and to certain instructions that were given.

We do not think it necessary to take up and consider in detail the rulings that were requested and refused. The gist of the plaintiff's cause of action is negligence. The defendant had the right to make the cut and build the runway, but was bound, at its peril, to see that due care was exercised in so doing, and if the washout was caused by negligence on its part in the construction and maintenance of the cut and runway, and the plaintiff was damaged thereby, while itself in the exercise of due care, then the defendant is liable. *Ainsworth v. Lakin*, 180 Mass. 397. The jury were instructed in accordance with the law as thus stated. While there may be one or two sentences or expressions in the charge which taken by themselves may seem to import that the defendant was absolutely liable for any damages caused by a washout due to the cut, and had no right to do anything that would interfere in any way with the drawing of water by the plaintiff from the pond through the canal, taking the charge as a whole the jury could not have failed to understand, we think, that the defendant was not liable unless it did not use due care in the construction and maintenance of the cut and runway. At the close of the charge the jury were expressly instructed at the defendant's request that the plaintiff's right to the use of the canal was subject to the defendant's right to cut and take ice and to its right to enter upon the pond, canal and the banks thereof for that purpose, and that if the jury found that the cutting and maintaining of the trench and runway were done by the defendant in "a reasonable, prudent and proper exercise of the defendant's right to cut, take, store and convey away ice to and from the canal and its right of way to, from and over the canal and the banks thereof . . . then the jury should find

* Samuel Bennett, Esquire.

† Hardy, J.

a verdict for the defendant." The unavoidable inference from this was, it seems to us, that if the jury found that the defendant built and maintained the cut and runway in a reasonable and prudent manner, that is, if it exercised due care, it was not liable, otherwise it was. In addition to this the presiding judge stated in beginning his charge that each party claimed that its property "has been injured by reason of the negligence or careless conduct of the other." In stating what the plaintiff claimed under his declaration the presiding judge said that it was not contended by the plaintiff that there was anything wilful in the conduct of the defendant but "only such conduct . . . as would be considered negligent or failing to do its duty, failing to do what it should have done under the circumstances." Again he said in speaking of what the duty of the defendant was, that it was "to exercise such right of removing the ice, or passing over the property covered by the easement, in such a way as not to unreasonably interfere with the right of the Moore Spinning Company [the plaintiff] to maintain the canal, . . . to carry water from the pond to its mill. It [the defendant] was called upon to exercise reasonable care in connection with the removal of the ice . . . It was called upon to exercise the care of a person of ordinary prudence under the circumstances, having due regard to what might happen in case such care was not exercised." The charge contains other references of a similar import to the nature of the defendant's duty and we do not see, as we have said, how, taking the charge as a whole, the jury could have failed to understand that the standard required of the defendant was that of due care.

Even if therefore the first count was, strictly speaking, defective in not alleging negligence and the instruction requested by the defendant to that effect should have been given,* no harm was done the defendant by its refusal since under the charge the jury could not have found for the plaintiff unless they found that the defendant was negligent in making and maintaining the cut and the runway and that the washout and the damage to the plaintiff were due to such negligence.

The jury were instructed in a manner not objected to, as we

* Among the requests refused were requests for rulings that the jury should find a verdict for the defendant on the first count, and that the first count stated no cause of action.

understand the matter, as to the necessity of the exercise of due care on the part of the plaintiff in regard to regulating the height and flow of water in the canal and the effect upon the plaintiff's right of recovery of failure on its part to exercise such due care. The jury were also instructed, as requested by the defendant, that if they were not satisfied that the washout was due to the cut and that that was the proximate cause of it, they should find for the defendant, and likewise that if the cut was simply a condition and not a cause of the washout that was not sufficient to warrant a verdict against the defendant. There was testimony as to the manner in which the cut was made and the runway built and maintained and it was for the jury to say whether there was negligence on the part of the defendant and whether the washout was due to such negligence. It would have been error to instruct the jury, as requested by the defendant, to return a verdict for the defendant generally or on the second or third count. Mere knowledge on the part of the plaintiff of the existence of the cut and runway did not preclude it from recovery or constitute such an acquiescence in their maintenance as to deprive the plaintiff of a right of action for the damages caused by the washout. There was nothing which warranted a finding that the plaintiff assumed the risk of a washout.

The defendant has not argued the rulings requested to the effect that the facts found by the auditor did not warrant a finding for the plaintiff generally or on either count and we therefore treat them as waived.

What we have said disposes, we think, of all of the requests except those relating to the auditor's report and the question of damages. It does not clearly appear whether the twenty-eighth and twenty-ninth requests * were in the end refused or not. If they were refused no exception appears to have been taken to the refusal.

* The twenty-eighth request was for an instruction that, if the jury should find that the plaintiff first acquired title to its mill and water rights several years after the cut in the bank of the canal was made by the defendant, any right of action for the construction of the cut accrued to the then owner of the mill and not to the plaintiff. The twenty-ninth request was for an instruction, that, if the jury should find that the washout was caused by changes in the banks of the canal made by "other persons not in the employ of the defendant," the plaintiff could not recover.

The auditor's report concluded with the following statement comprising the last two lines: "I find that the defendant owes the plaintiff on December 27, 1909, the sum of \$7,061.63." The defendant asked the presiding judge to rule that, "The last two lines of the auditor's report, finding that the defendant owes the plaintiff a certain sum are not evidence in this case and should not be considered by the jury in weighing the evidence." The presiding judge refused so to rule and instructed the jury as follows: "The mere fact that the auditor may have stated at the end of his report that the defendant owes \$5,000, or \$6,000, is not sufficient for you to make a finding upon in this case. You are to consider all the report; consider it in all its parts. It is not for you to select one or two sentences. I give you instruction on this point to deal with the whole report and see whether you are satisfied from that whole report that the evidence is sufficient to sustain the findings of the auditor." The only evidence before the jury in regard to the matter of damages was that contained in the auditor's report, and that set out the different items of damage claimed by the plaintiff, and what the auditor allowed under each and what the contentions of the defendant were in respect to such items and how they were dealt with by the auditor so that the jury were not limited to the last two lines but had the whole matter before them. If the finding by the auditor could not be regarded as a summing up by him and as a finding of fact rather than a conclusion of law, which we do not mean to intimate, it was nevertheless competent for the presiding judge to direct the attention of the jury, as he did, to other portions of the report and for the jury to take the whole report into consideration in passing upon the question of damages. We see no error in the manner in which this matter was dealt with.

In regard to damages the general rule is that a wrongdoer is "liable for any injury which is the natural and probable consequence of his misconduct. He is liable not only for those injuries which are caused directly and immediately by his act, but also for such consequential injuries as, according to the common experience of men, are likely to result from his act." *Derry v. Flitner*, 118 Mass. 131, 134. *Stock v. Boston*, 149 Mass. 410. Applying the rule thus laid down, it is plain that the plaintiff was entitled to recover for the loss of profits due to

the interruption of the mills caused by the washout, and for the expense to which it was put in repairing the break in the bank of the canal and in securing a temporary supply of water. There is nothing to show that the damages thus sustained were not the natural and probable consequences of the washout and could not be ascertained with reasonable certainty and without resort to speculation, and the defendant is therefore liable for them. *White v. Moseley*, 8 Pick. 356. *French v. Connecticut River Lumber Co.* 145 Mass. 261. *Stock v. Boston*, *supra*.

Exceptions overruled.

The case was argued at the bar in December, 1910, before *Knowlton*, C. J., *Morton*, *Loring*, *Sheldon*, & *Rugg*, JJ., and afterwards was submitted on briefs to all the justices then constituting the court except *Loring*, J.

R. B. Stone, for the defendant.

W. D. Turner, (*J. D. Colt* & *S. S. Fitzgerald* with him,) for the plaintiff.

DANIEL MURPHY vs. FRED T. LEY AND COMPANY,
Incorporated.

Worcester. October 2, 1911. — January 1, 1912.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DECOURCY, JJ.

Nuisance, Identity of wrongdoer. *Evidence*, Competency. *Agency*, Declarations of agent.

In an action against a corporation, named "Fred T. Ley & Co., Inc.," for injuries caused by the plaintiff's horse being thrown down by wires stretched across a highway on which the plaintiff was driving, there was evidence of due care on the part of the plaintiff and of negligence on the part of the person engaged in stringing the wires. The case came to this court by a report of the presiding judge and presented the question whether there was evidence for the jury that the work of stringing the wires was being done by the defendant. There was evidence that the work of stringing wires in that neighborhood had been going on for some days, that one D, who was designated by the plaintiff's counsel in putting his questions as "the superintendent of the Fred T. Ley Company," was around there while the work was being done, instructing the men what to do, and that the teams and tool boxes were marked "Fred T. Ley Construction Co.," "F. T. Ley Construction Co.," "F. T. Ley," and "Fred T. Ley." There was no testimony that the corporate name of the defendant, "Fred T. Ley & Co., Inc.," appeared on any tool box or wagon. The report showed that in a discussion at the trial in regard to the admissibility of certain

declarations made by D, it was understood and assumed by the presiding judge and by the counsel on both sides that D was referred to by the plaintiff as a superintendent of the defendant, although he was mentioned as "the superintendent of the Fred T. Ley Corporation," and that no question was raised of misnomer or of the identity of the defendant under different names, but only as to the authority of this superintendent of the defendant to affect his employer by his statements. *Held*, that, on the evidence presented by the report and the inferences that justifiably might be drawn from it when not explained or controlled by the production of facts necessarily in the possession of the defendant, the plaintiff was entitled to go to the jury.

In an action for injuries caused by the plaintiff's horse being thrown down by wires stretched across a highway on which the plaintiff was driving, where it appeared that one D "was around there" while the work of stringing wires across the highway was being done, and that he was "instructing the men what to do," and there was evidence warranting an inference that D was the defendant's superintendent, the plaintiff offered to prove by his own testimony that D came to the plaintiff's house during the plaintiff's illness caused by the injuries and there stated to the plaintiff that he was the superintendent for the defendant and that the defendant was doing the work when the plaintiff was injured. This evidence was excluded. *Held*, that the exclusion was proper; the statement not having been made by D in the performance of his duty as the defendant's superintendent.

DECOURCY, J. The plaintiff, on September 30, 1909, at about eight o'clock in the evening, was driving along a highway in the town of Lancaster, when his horse ran against some wires which were stretched across the road, and he was thrown to the ground and sustained the injuries complained of. At the close of the plaintiff's case the judge * directed a verdict for the defendant and reported the case to this court.

There was ample proof of the plaintiff's due care, and of negligence on the part of the person engaged in stringing the wires across the highway. The question is whether there was evidence for the jury that the work was being done by the defendant.

The jury would be warranted by the testimony in finding that the work of stringing wires in that neighborhood had been going on for some days; that one Daly, designated by the plaintiff's counsel, in the questions put by him to the plaintiff, as "the superintendent of the Fred T. Ley Company," was around there while the work was being done, instructing the men what to do; that the teams and tool boxes were marked "Fred T. Ley Construction Co.," "F. T. Ley Construction Co.," "Fred T. Ley Company," "F. T. Ley," "Fred T. Ley," as witnesses variously testified; and that no teams or tools were there with any indi-

* *Morton, J.*

vidual name other than Fred T. Ley upon them. It is true, as argued by the defendant's counsel, that if the evidence be taken strictly, there is no testimony that the corporate name of the defendant, "Fred T. Ley & Co., Inc." appeared on any tool box or wagon, and if nothing further appeared to connect the defendant with the work we should hesitate to say that the plaintiff had sustained the burden of proof. But an examination of the record shows that in the discussion upon the admissibility of declarations made by Daly, it was understood and assumed by the judge and by both counsel that Daly was referred to as superintendent of the defendant corporation, although in terms he was mentioned as "superintendent of the Fred T. Ley Company." No question was raised of misnomer or of the identity of the defendant under different names, but only as to the authority of this superintendent of the defendant company to affect his employer by his statements.

Even so construing the report the evidence presented to establish negligence on the part of this defendant was meagre. But with the inferences that justifiably might be drawn therefrom, and not explained or controlled by facts that necessarily would be in the possession of the defendant, we think it was sufficient to entitle the plaintiff to go to the jury. *Smith v. Paul Boyton Co.* 176 Mass. 217. *Norris v. Anthony*, 198 Mass. 225. *Bagley v. Wonderland Co.* 205 Mass. 238.

The declarations of the superintendent, when he came to the plaintiff's house during his illness, were properly excluded.* They were not made in the performance of his duty and therefore were not binding upon the defendant. *McKinnon v. Norcross*, 148 Mass. 538. *Bachant v. Boston & Maine Railroad*, 187 Mass. 892. *McKenna v. Gould Wire Cord Co.* 197 Mass. 406.

In accordance with the report judgment is to be entered for the plaintiff in the sum of \$400; and it is

So ordered.

The case was submitted on briefs.

G. E. O'Toole & J. H. O'Brien, for the plaintiff.

H. Parker, C. C. Milton & F. L. Riley, for the defendant.

* The plaintiff offered to prove that Daly stated to him that he was superintendent for Fred T. Ley & Co., and that that company was doing the work where the plaintiff was injured, and that the statements were made by Daly when he came to the plaintiff's house during his illness.

✓ 213-224
✓ 213-253
✓ 235-494

JOHN M. O'NEILL vs. COUNTY OF WORCESTER.

Worcester. November 20, 1911. — January 1, 1912.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DeCOURCY, JJ.

Practice, Civil, Judge's findings of fact, Exceptions. Dog Officer. Officer. Statute, Construction.

No exception lies to the refusal of a judge before whom an action at law is tried without a jury to make particular findings of fact. In the present case the findings of the judge contrary to those requested were warranted by the evidence.

Under R. L. c. 102, § 143, a bill for services as a dog officer in a city must be approved by the mayor of the city as a condition precedent to payment by the county treasurer.

Under R. L. c. 102, § 143, requiring that a bill for services as a dog officer in a city shall be approved by the mayor of the city as a condition precedent to payment, the approval of such a bill by the person who was the mayor of the city when the services were rendered, given after he has ceased to be such mayor, is of no effect.

Under R. L. c. 102, § 143, as amended by St. 1907, c. 240, and St. 1908, c. 182, providing that a dog officer shall hold office for one year or until his successor is appointed and qualified, and that in cities of twenty-five thousand inhabitants, or more, such officers "shall be paid the same wages per diem during the term of their employment which the regular police officers of such cities receive," the wages of such an officer are to be paid by the day during the term, not of his office, but of his actual employment as such dog officer, and the subsequent amendment of the statute by St. 1911, c. 391, limiting the compensation of dog officers to the time actually employed, is merely declaratory of the meaning of the statute amended.

CONTRACT for services as a dog constable of the city of Fitchburg under R. L. c. 102, §§ 143, 144, as amended by St. 1907, c. 240, and St. 1908, c. 182. Writ dated July 5, 1910.

The declaration as amended by substitution contained three counts, the first count on an account annexed for services as dog constable from October 1, 1908, to January 1, 1909, ninety-two days at the rate of \$2.75 a day, \$253, the second count on an account annexed for services as dog constable from January 1, 1909, to January 1, 1910, three hundred and sixty-one days at \$2.75 a day, \$992.75, and the third count, a special one, setting forth the plaintiff's appointment, alleging the performance of services and approval of his bills by the mayor of the city of Fitchburg, and claiming the sum of \$1,245.75.

The defendant's answer contained a general denial, and, by amendment, an allegation that the bills of the plaintiff as dog officer were not duly and properly approved by the mayor of the city of Fitchburg.

In the Superior Court the case was tried before *King, J.*, without a jury. The judge made a memorandum of decision, which included the following findings:

"The plaintiff was appointed a constable in Fitchburg on January 6, 1908, for one year, or until his successor was (or should be) appointed and qualified. On January 4, 1909, he was reappointed for a like period or term. He duly qualified and served for each term. July 7, 1908, a warrant was issued to him by the mayor of that city, directing him forthwith to kill, or cause to be killed, all dogs within said city, not duly licensed and collared according to law, and to make due return of the warrant and his doings thereunder on or before October first of that year. He made return thereof and was paid for his services rendered, to October 1, 1908. . . . The plaintiff claims wages for every day, Sundays included, from October 1 to December 31, 1908, at \$2.75 per day, that being the per diem wage at the time of regular police officers in Fitchburg.

"The plaintiff's bill for services for the period in question was not approved by the mayor of Fitchburg, but it was attempted to be approved May 28, 1910, not by the mayor at that time, but by the man who was mayor in 1908.

"The court finds and rules: That the plaintiff cannot recover in this action any wages from October 1 to December 31, 1908, because his bill for such services has not been approved according to law; that no recovery can be had under the first or second count of the declaration because recovery is sought under and by virtue of a statute, and the facts are not specially and sufficiently pleaded in either of said counts and as necessary to fix a liability upon defendants. . . .

"If it is material, the court finds that the plaintiff did not render services as constable, under said warrant of July 7, 1908, every day from October 1 to December 31, 1908; and the plaintiff made no return to the mayor of said city upon said warrant at the expiration of his term of office, as required by law.

"The plaintiff served as constable throughout the year 1909.

A warrant was issued to him on July 9, 1909, by the mayor of Fitchburg, under the provisions of R. L. c. 102, § 143. He acted under said warrant from the date thereof to and until October 1, 1909, and then made return thereof to the mayor. Said return was not in full compliance with the requirements of law, St. 1907, c. 240, § 2, amending R. L. c. 102, § 144, in that it did not state the names of the owners or keepers of the dogs killed by the plaintiff under said warrant, or any of them; and it did not state the names of the persons against whom complaints had been made, or whether complaints had been made or entered against all persons who had failed to comply with the provisions of law relative to the licensing of dogs, and the plaintiff did not thereafter and at the expiration of his term of office make any further or other return to the mayor issuing said warrant of July 9, 1909.

"And, if it is material, the court finds that the plaintiff did not render services as dog constable, or dog officer, or under or by virtue of the provisions of R. L. c. 102, § 143, as amended by St. 1907, c. 240, and St. 1908, c. 182, for three hundred and sixty-one days in the year 1909 as set forth in the declaration in this section [count].

"The court finds that the term or time of his actual employment in the rendering of such services during said year was eighty-four days and no more, and that he is entitled to receive compensation therefor at the rate of \$2.75 per day.

"The plaintiff held office for the entire year 1909, but the term of his employment within the meaning of the statute was eighty-four days only.

"The city of Fitchburg had at the time twenty-five thousand inhabitants or over and the regular police officers of that city during said year 1909 received as wages \$2.75 per day.

"The plaintiff is entitled to recover for services rendered during the year 1909 the sum of \$231 under the third count of his amended declaration, and judgment is to be entered accordingly."

At the close of the evidence the judge refused to make certain rulings requested by the plaintiff relating to matters which are covered by the memorandum of decision.

The plaintiff also asked the judge to make the following findings of fact:

"1. During the time from October 1, 1908, to December 31, 1908, and during the entire year of 1909, the plaintiff performed the duties of dog officer of said city by virtue of an appointment duly made by the mayor of said city for said period of time and by virtue of a warrant duly issued to him by said mayor in July, 1908, and July, 1909.

"Upon all the evidence the plaintiff performed a full day's work for each day named in his declaration."

The judge refused to make either of these findings. He found for the plaintiff in the sum of \$231; and the plaintiff alleged exceptions.

The case was submitted on briefs.

J. F. McGrath, for the plaintiff.

E. H. Vaughan, E. T. Esty & J. Clark, Jr., for the defendant.

SHELDON, J. 1. No exception lies to the refusal of the judge to make particular findings of fact. Were this not so, the judge was not bound, even upon the plaintiff's testimony and the evidence furnished by the entries in his books, to make the findings asked for, and the findings made were fully warranted by the testimony.

2. It was required by R. L. c. 102, § 143, that the plaintiff's bill should be approved by the mayor of his city and should be paid from a certain fund. This approval was a condition precedent to payment. Without it the county treasurer had no authority to pay the bill. It was the only means provided to inform the treasurer that the services had been performed and that the bill was a proper one. In this respect the case is stronger than was presented in *Haverhill v. Marlborough*, 187 Mass. 150, 156. And it is too plain for argument that an approval by one who was not mayor, although he had held that office in a former year when it was claimed that the services had been rendered, was not the approval required by the statute.

3. Under the same statute, as amended by St. 1907, c. 240, and St. 1908, c. 182, it was provided that the plaintiff's term of office should be for one year or until the appointment and qualification of his successor, and that his pay should be "the same wages per diem during the term of [his] employment" as were paid to the police officers of the city. The change in the same statute from "office" to "employment" must be deemed to have

been made advisedly. His wages were to be by the day during the term, not of his office, but of his employment. There is a manifest reason for this in the nature of the services which he was to render. When, as in this case, he actually served only eighty-four days in the year, we cannot suppose that it was intended to pay him for every day, including Sundays and holidays. If this were so, there would be no occasion for requiring a bill for services and its approval by the mayor, or for making the pay a *per diem* one. Indeed our view seems to have been that of the plaintiff, for he based his demand on the claim, which however he failed to maintain on the evidence, that he actually had worked on every day except while he was absent by the permission of the mayor.

We are clearly of opinion that he was entitled to recover only for the time during which he was actually employed in rendering services. St. 1911, c. 891, passed after the bringing of this action, and in terms limiting the compensation of dog officers to the time of their actual employment, seems to us to be rather a declaratory act than an indication that previously the effect of the statute was different.

The plaintiff's requests for rulings were rightly dealt with.

Exceptions overruled.

BOARD OF HEALTH OF THE CITY OF WORCESTER vs.
GEORGE L. TUPPER.

Worcester. November 21, 1911. — January 1, 1912.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DECOURCY, JJ.

Equity Pleading and Practice, Interlocutory decree, Exceptions to rulings of judge, Parties, Amendment. *Equity Jurisdiction*, To restrain maintenance of stable without license. *Stable. Board of Health, Municipal. Municipal Corporations. Superior Court.*

An appeal from an interlocutory decree overruling a demurrer to a bill in equity cannot be brought before this court by a bill of exceptions, alleging exceptions to the rulings of the trial judge, who, after the overruling of the demurrer, heard the case on the issues raised by the answer.

Under R. L. c. 102, § 71, a suit in equity may be maintained in the Superior Court to restrain the erection, occupation or use of a building for a stable without

a license from the board of health in a city whose population exceeds twenty-five thousand, where there is a reasonable certainty that the building in question is to be occupied and used as a stable unlawfully, although no actual injury to the public has been inflicted at the time the bill is filed.

In a suit in equity in the Superior Court under R. L. c. 102, § 71, to restrain the erection, occupation or use of a building for a stable without a license from the board of health in a city whose population exceeds twenty-five thousand, where it appears that the defendant has erected a building which he intends to occupy and use as a stable for horses, it is no defense to show that the board of health acted arbitrarily and unjustly in refusing the defendant a license, nor is it material for the defendant to show the excellent sanitary condition of the building or its complete plumbing and appointments and its mode of construction, nor to show that stables of other persons in more densely populated sections of the city have been licensed.

Where, at the trial of a suit in equity, evidence which was incompetent for the purpose for which it was offered was excluded by the trial judge on that ground, an exception to such exclusion cannot be sustained on the ground that the evidence was admissible for the purpose of impeaching the testimony of the principal witness on the other side by showing bias or prejudice on his part, if it was not offered for that purpose.

A suit in equity in the Superior Court under R. L. c. 102, § 71, to restrain the erection, occupation or use of a building for a stable without a license from the board of health in a city whose population exceeds twenty-five thousand, must be brought by the city itself and not by the members of its board of health.

BILL IN EQUITY, filed in the Superior Court on March 9, 1908, amended by the filing of a substituted bill on February 25, 1909, and further amended on October 18, 1909, by the members of the board of health of the city of Worcester under R. L. c. 102, § 71, to restrain the defendant from completing the erection of a building designed to be used as a stable on the defendant's land on Shirley Street in Worcester, from plumbing such building for stable purposes and from using and occupying it as a stable without a license for such plumbing and occupation granted by the plaintiffs under R. L. c. 102, § 69.

A demurrer to the substituted bill was overruled by *Sanderson, J.*, and the defendant appealed from the order overruling the demurrer.

On the issues raised by the defendant's answer the case was heard by the same judge. The material facts and the questions raised at the trial by the exclusion of certain evidence are stated in the opinion. At the close of the evidence the defendant asked for the following instructions:

"1. On all the evidence the plaintiffs cannot maintain their bill.

"2. That there is no evidence that R. L. c. 102, § 69, has been violated.

"3. That the bringing of the bill was premature.

"4. Complete and adequate remedy is provided by statute to the board of health for the abatement of a nuisance immediately upon the violation of § 69, so far as it pertains to the occupancy of buildings for the stabling of horses."

The judge refused to make any of these rulings and made the following memorandum of decision:

"The court finds that the defendant is the owner of a building which he has fitted up as a stable to accommodate ten horses; that he has applied to the board of health three times for a license to occupy and use said building for a stable for horses and that the license has in each case been refused; that notwithstanding said refusal he has repeatedly said in substance and effect to one member of the board of health that he would occupy the stable without a license, and that he continued to make such statements up to the time of the bringing of the bill in equity asking that he be enjoined from occupying said building as a stable; that the defendant meant by said statements that he intended to occupy said building for a stable for horses without a license."

At the request of the defendant the judge made an additional finding of fact as follows: "The member of the board of health to whom the defendant made the statements referred to in said memorandum is James C. Coffey."

The judge made a decree for the plaintiffs ordering that an injunction should issue; and the defendant alleged exceptions to the refusal of the rulings requested by him and to the exclusion of the evidence referred to above and described in the opinion.

The case was submitted on briefs.

C. E. Tupper, for the defendant.

E. H. Vaughan & C. S. Anderson, for the plaintiff.

BRALEY, J. The appeal from the interlocutory order overruling the demurrer is not before us, as no final decree has been entered. *Forbes v. Tuckerman*, 115 Mass. 115, 118, 119. *Fuller v. Chapin*, 165 Mass. 1, 3. But as the exceptions cover in scope the question whether proof of the allegations of the bill as amended makes out a case for equitable relief, as well as the

question whether the evidence warranted the decree ordered, the defendant to this extent has all the advantage which he could have derived from the appeal. *Ontario Bank v. Root*, 8 Paige, 478. *Small v. Boudinot*, 1 Stockton, 381. *Thompson v. Thompson*, 1 Yerg. 97.

The bill does not go upon the general equity jurisdiction of the court, to restrain the unlawful use of a building which creates a nuisance made punishable as a statutory, or common law misdemeanor. *Vegelahn v. Guntner*, 167 Mass. 92. If it were so brought, the defendant's building not having as yet been used for an offensive purpose, there would have to be adequate proof, that unless relief were given the threatened act sought to be enjoined would be so substantial in character that the public health might suffer before effectual steps could be taken to stop its continuance or to punish the wrongdoer. *Attorney General v. Metropolitan Railroad*, 125 Mass. 515, 516. *Beck v. Railway Teamsters Protective Union*, 118 Mich. 497. *Hamilton-Brown Shoe Co. v. Sazey*, 181 Mo. 212. *In re Debs, petitioner*, 158 U. S. 564. See 2 Dan. Ch. Pl. & Pr. (6th Am. ed.) 1620, note a. But the provisions of the R. L. c. 102, § 69, which have been held to be constitutional, make it unlawful for any person to "erect, occupy or use for a stable any building in a city whose population exceeds twenty-five thousand unless such use is licensed by the board of health of said city, and, in such case, only to the extent so licensed." *Newton v. Joyce*, 166 Mass. 88. And by § 71, under which the bill is brought, a violation of these provisions is made a penal offense, while jurisdiction in equity is conferred upon the Superior Court "to restrain such erection, occupation or use." The statute was designed to protect the health and comfort of the community, and should receive a construction which the plain meaning of the words imports. If there is reasonable certainty that a building is to be unlawfully occupied and used for the stabling of horses, the public authorities need not delay action until the purpose of the owner or those in control has been accomplished, but may under § 71 prevent the attempted creation of a statutory nuisance, even if no actual injury to the public has been inflicted. *Langmaid v. Reed*, 159 Mass. 409, 411.

The evidence justified the finding of the judge, that it was the

defendant's intention to occupy and use as a stable for horses the building which he had erected, and whether the board of health acted arbitrarily and unjustly in refusing him a license cannot be reviewed in these proceedings. *White v. Kenney*, 157 Mass. 12. *Lowell v. Archambault*, 189 Mass. 70.

Nor was evidence of the excellent sanitary conditions of the building, or of its complete plumbing and appointments, and mode of construction, or that stables of other persons located in more densely populated sections of the city had been licensed admissible. The statute makes no distinction of this nature, and, if the board in the instances to which he referred had exhibited partiality or want of sound judgment, the defendant was answerable only for his failure to comply with the law, to which their alleged delinquencies were no defense.

The testimony for the plaintiffs, however, upon which the decision of the judge rests, was given by the plaintiff, James G. Coffey. It is true, that while any statements by this plaintiff either individually or as a member of the board exhibiting bias or prejudice against the defendant would be collateral to the question of the defendant's intention to violate the statute, yet they would have been admissible to affect his credibility as a witness, and the weight to be given to his testimony. *Day v. Stickney*, 14 Allen, 255. But the exception to the exclusion of the question asked of the defendant in direct examination, whether he had not been informed by Coffey that a license would not be granted because he had published articles in the newspapers reflecting upon the refusal of the board to grant a license, was put upon the ground that the offer was to show unjust discrimination. The evidence subsequently offered, that this witness had said to the defendant that he would not grant a license under any circumstances because of his antipathy to and dislike for him and because of his conduct in publishing statements in the newspapers, apparently was excluded for the same reason. No exception, however, was taken to the exclusion, and the question which the defendant endeavors to raise is not before us.

The first, second, third and fourth requests for rulings present no questions which are not disposed of by what we have said, except that under the first request the inquiry remains, whether the plaintiffs have established their right to institute and prosecute

the suit. It is, of course, clear that under § 71 a criminal prosecution could be instituted only in the name of the Commonwealth, or if an information in equity had been presented it must have been in the name of the Attorney General. *Attorney General v. Metropolitan Railroad*, 125 Mass. 515. The plaintiffs are described and they prosecute as a board of health, but their powers and duties are defined by statute. R. L. c. 75, §§ 9-15, 65-90. *Belmont v. New England Brick Co.* 190 Mass. 442. The authority to preserve the health of the inhabitants is lodged in the municipality, and the members of the board are officers of the city. *Salem v. Eastern Railroad*, 98 Mass. 481, 442. It is for this reason that suits to enforce the orders of a board of health for the removal, suppression, and abatement of a nuisance, or for its prevention have uniformly been brought in the name of the city or town, since the decision in *Winthrop v. Farrar*, 11 Allen, 398. *Watertown v. Mayo*, 109 Mass. 815. *Taunton v. Taylor*, 116 Mass. 254. *Quincy v. Kennard*, 151 Mass. 563. *Newton v. Joyce*, 166 Mass. 83. *Brookline v. Hatch*, 167 Mass. 380. *Cambridge v. Trelegan*, 181 Mass. 565. *Lowell v. Archambault*, 189 Mass. 70. *Belmont v. New England Brick Co.* 190 Mass. 442. The bill in effect, however, is in behalf of the city of Worcester, and it may be amended to make the city in form the plaintiff. If this is done, the order will be, exceptions overruled, otherwise they must be sustained. *Fay v. Walsh*, 190 Mass. 874, 377, 878.

So ordered.

THOMAS W. PEIROE vs. AMERICAN EXPRESS COMPANY.

Suffolk. December 18, 1911. — January 1, 1912.

215-254
221-240

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, & SHELDON, JJ.

Agency, Scope of authority. Carrier, Of goods. Damages, Limitation.

Where the owner of an automobile ships by an express company certain parts of the machinery of the automobile to a machine shop to be repaired, without giving the proprietor of the machine shop any special instructions or special authority as to the contract of shipment which he shall make in returning the parts of machinery after they have been repaired, this authorizes the proprietor

of the machine shop, in returning the parts of machinery to the owner, to make the usual shipping agreement with the express company for their transportation, and, if such agreement contains a provision limiting the value of the property transported and the amount to be recovered in case of its injury to \$50, this limitation is binding on the owner in an action brought by him against the express company to enforce its liability as carrier for an injury to the goods while in transit.

CONTRACT OR TORT for damage to a crank case and shaft of an automobile belonging to the plaintiff alleged to have been injured on February 28, 1908, while being transported by the defendant as a common carrier for delivery to the plaintiff at Topsfield. Writ dated January 11, 1909.

The answer, besides a general denial, contained the following allegations: "That the shipment referred to in the plaintiff's declaration was made by the consignor thereof and accepted by the defendant in accordance with and subject to the terms of a certain written contract wherein it was expressly provided that the defendant should not be held liable or responsible, 'nor shall any demand be made upon it beyond the sum of \$50, unless the just and true value thereof is stated herein and an extra charge is paid or agreed to be paid therefor based upon such higher value,' . . . that the just and true value of said shipment was not stated in said contract, but that in said contract the statement was made 'value asked and not given,' wherefore the defendant says that if it is liable, it is not liable for an amount in excess of the sum of \$50." The defendant filed with its answer an offer of judgment for \$53.

In the Superior Court the case was tried before *Fessenden, J.*

At the trial, before any evidence was introduced, the plaintiff's counsel stated that it was conceded by the defendant that the plaintiff's crank case and shaft were received on February 28, 1908, by the defendant at the premises of the Harry Fosdick Company at Boston and that they were marked to "T. W. Peirce, Topsfield, Mass.;" that the plaintiff conceded that at the time of the receipt of the crank case and shaft by the defendant, the driver of the defendant signed and delivered to the Harry Fosdick Company a receipt for the shipment, which is described below; that it also was conceded by the defendant that the crank case and shaft were broken on an elevator in the North Station in Boston while in the possession of the defendant and

while on their way to Topsfield and subsequently were returned to the premises of the Harry Fosdick Company by the defendant.

It appeared by the evidence that the plaintiff's chauffeur with the plaintiff's authority had sent the crank shaft and case from Topsfield to the Harry Fosdick Company in Boston for repairs, and that, after the repairing was done, the shipper for the Harry Fosdick Company delivered them to the defendant to be returned to the plaintiff and took a receipt limiting the value to \$50.

The defendant introduced in evidence the receipt signed by the defendant's driver and given by him to the Harry Fosdick Company for the shipment. The receipt was contained in a book in which the Harry Fosdick Company took receipts for its shipments by the defendant as carrier. On the inside front cover of this book was printed, among other matters, the following:

"American Express Company. (Not negotiable.) Notice to Shippers.

"This Company undertakes to forward to the nearest point to destination reached by it, all properties which may be receipted for by the authorized Agents of the Company, on its blank receipts Nos. 49, 51 and 55, subject to the following terms and conditions, and which terms and conditions are agreed to by shipper or owner in accepting this receipt.

". . . nor in any event shall this Company be held liable or responsible, nor shall any demand be made upon it beyond the sum of Fifty Dollars, unless the just and true value thereof is stated herein, and an extra charge is paid or agreed to be paid therefor, based upon such higher value; . . .

"The liability of this Company is limited to \$50, unless the just and true value is stated in this receipt, and an extra charge is paid or agreed to be paid therefor, based upon such higher value. . . ."

On one of the pages of the book was the following: "American Express Company at Boston, Received of H. F. Co. The property hereinafter described, which the Express Company undertakes to forward to the nearest point to destination reached by it, subject to the terms and conditions of the Company's regular form (49, 51, 55) of receipt printed on inside front cover of this book and which terms and conditions are agreed to by the shipper or owner in accepting this receipt (Not Negotiable)."

At the close of the evidence the judge ruled for the purposes of the case that the evidence would not justify the jury in finding that there was any authority, express or implied, given by either the plaintiff or his chauffeur to the shipper, the Harry Fosdick Company, to limit in any way the liability of the defendant or any other express company. The defendant excepted.

It was agreed by the parties that the shipper did have implied authority to send the crank shaft and case by the defendant, but the plaintiff did not agree that there was any authority, express or implied, to limit the liability, and did not agree that there was any authority to ship at all by the defendant with a limit of liability.

The parties agreed that, if the measure of damages was the sum limited in the shipping receipt, judgment should be for the plaintiff in the sum of \$50 and interest up to the time of the offer of judgment, or in all \$53; that if the limitation of liability in the receipt was not binding on the plaintiff, there should be judgment for the plaintiff in the sum of \$551.86 and interest; that, if the plaintiff was entitled to recover for the value of the loss of use, the sum of \$1,500 and interest should be added; and that, if the plaintiff was entitled to recover for the lessened value on September 1, 1908, from what it was on March 1, 1908, the sum of \$1,000 and interest should be added.

There also was the following stipulation: "In case the Supreme Judicial Court shall decide that there was evidence which would justify the jury in finding that there was an express or implied authority from the plaintiff or his chauffeur on the part of the shipper to limit the liability, then the case shall stand for a new trial, unless the Supreme Judicial Court shall determine that that is immaterial."

The judge ordered a verdict for the plaintiff in the sum of \$58, and reported the case for determination by this court.

E. F. McClennen, for the plaintiff.

A. M. Pinkham, for the defendant.

SHELDON, J. The plaintiff shipped his property by the defendant to the Fosdick Company and left it to that company to send it back to him without any special instructions or any special authority as to the contract which it should make. That authorized the Fosdick Company to make the usual shipping

agreement with the defendant; and all the evidence is that it did so. Certainly there was no evidence to the contrary. Accordingly the plaintiff is bound by the terms of the agreement on which the defendant received and transported the property; there was no evidence on which the plaintiff could recover more than the sum named in that agreement; and there must be judgment on the verdict.

So ordered.

COMMONWEALTH vs. RICHARD G. RILEY.

Bristol. October 23, 1911. — January 1, 1912.

Present: RUGG, C. J., HAMMOND, BRALEY, & DECOURCY, JJ.

Labor, Employment of women. Constitutional Law. Pleading, Criminal, Complaint.

The provisions of St. 1909, c. 514, § 48, limiting the time during which women may be employed in manufacturing and mechanical establishments to fifty-six hours in each week and to ten hours in each day, "unless a different apportionment of the hours of labor is made for the sole purpose of making a shorter day's work for one day of the week," except that where employment is by seasons the hours of labor in each week may exceed fifty-six but not fifty-eight hours if the total number of hours of such employment in any year shall not exceed an average of fifty-six hours in each week for the whole year excluding Sundays and holidays, were constitutional.

While those provisions of St. 1909, c. 514, § 48, (which remain in force after the amendment of another portion of the section by St. 1911, c. 484,) requiring one employing women or children in a manufacturing or mechanical establishment to post in a conspicuous place in every room "in which such persons are employed a printed notice stating the number of hours' work required of them on each day of the week, the hours of commencing and stopping work, and the hours when the time allowed for meals begins and ends," do not require that such a notice shall be posted as to the hours of labor of women or children hired temporarily or intermittently to perform tasks subsidiary to the main business of the establishment, they do require a posting of such a notice with regard to the hours of labor of all women and children regularly employed in the establishment in labor practically permanent.

The means provided by St. 1909, c. 514, § 48, for enforcing the provisions of that section with regard to the hours of labor of women and children in manufacturing and mechanical establishments by the posting of certain notices stating their hours of labor and of intermissions for meals and the infliction of a penalty for a failure to do so, when read with the other provisions of the statute, are not unreasonable, unnecessary or arbitrary and are within the powers of the Legislature.

A criminal complaint charged that the defendant on a certain date in February, 1910, "being then and there the superintendent of" a certain corporation carrying on

a certain manufacturing establishment in which women were employed and in which the corporation had caused to be posted and had maintained on the date named in a conspicuous place "in a certain room therein in which said room were employed certain women," among them a woman named C, "printed notice that said women were required to work in laboring during the hours set forth in said notice" with an hour out for dinner beginning at 12 and ending at 1 P. M., "did then and there employ" C "in laboring in said mill and in the room in which said notice was posted . . . at a time other than that stated in said printed notice, to wit, at five minutes of one o'clock" on the day named, such employment not being by reason of time lost through the stopping of machinery upon which she was employed or dependent for employment. *Held*, that the complaint sufficiently charged a violation of St. 1909, c. 514, §§ 48, 49.

Although by § 70 of St. 1909, c. 514, the superintendent of a manufacturing establishment, in which are posted proper notices of the hours of labor of women therein in accordance with the requirements of § 48 of the statute, cannot be held responsible for a violation of that section if a woman works in the establishment during a part of the time allowed in the notice for meals without his "orders, consent or knowledge," one who is such a superintendent and has general charge of the operations of the establishment, the overseers thereof being subject to his orders, may be found guilty of a violation of § 48 in employing a woman in a certain room therein five minutes before the end of an hour stated upon notices of the hours of labor for women in that room to be the hour set apart for dinner, upon evidence that tended to show merely that the machinery therein was started by an overseer five minutes before the hour, that a woman therein then did some work on one machine, and that afterwards, when spoken to regarding the matter by a State inspector, the superintendent said, "Wasn't it all right, five minutes of?"

COMPLAINT received and sworn to in the Second District Court of Bristol on March 1, 1910, charging the defendant with a violation of St. 1909, c. 514, §§ 48, 49, in that on February 24, 1910, "being then and there the superintendent of the Davol Mills," a corporation carrying on a manufacturing establishment in Fall River, in which women were employed and in which the corporation had caused to be posted and had maintained on February 24 "in a conspicuous place in said establishment in a certain room therein in which said room were employed certain women," among them one Nora Callahan, "printed notice that said women were required to work in laboring during the hours set forth in said notice," which were from 6.50 A. M. to 6 P. M. with an hour for dinner beginning at 12 and ending at 1 P. M., "did then and there employ" Nora Callahan "in laboring in said mill and in the room in which said notice was posted . . . at a time other than that stated in said printed notice, to wit, at five minutes of one o'clock" on February 24, 1910, such employment not being by reason of time lost through the stop-

ping of machinery upon which she was employed or dependent for employment.

On appeal to the Superior Court, the case was tried before *Dana, J.* Before the jury were empanelled, the defendant moved to quash the indictment on the following grounds:

"1. It alleges that the defendant personally employed women at a time other than that stated in a notice posted by another.

"2. The provision of the statute under which the offense is alleged to have been committed by the defendant's violation thereof is unconstitutional and void.

"3. It charges two offenses in one count."

The motion was denied; and the defendant alleged an exception.

There was evidence at the trial tending to show that the allegations of the complaint with regard to the posted notice were true, that *Nora Callahan* was employed in the carding room of the *Davol Mills*, that the defendant was the superintendent of the mills and had general charge of their operations, that the overseers were subject to his orders, that on the day named in the complaint a State factory inspector went into the carding room in question and at five minutes of one saw the overseer, not the defendant, come out of the office, look at his watch and start the first speeder frame. *Nora Callahan* then started her frame which was right back of the one started by the overseer, saw that everything was in proper running order and then walked to the window. The inspector afterwards asked the defendant if he was aware of the time they were starting up. He said, "Wasn't it all right, five minutes of?" and asked if they were not allowed five minutes.

At the close of the evidence, the defendant asked the presiding judge to rule as follows:

"1. There is no evidence that will warrant the jury in finding the defendant guilty of any offense under the laws of this Commonwealth.

"2. Unless the jury are satisfied beyond a reasonable doubt that the defendant himself employed the alleged woman, the defendant is not guilty.

"3. On the whole evidence the defendant is not guilty."

The rulings were refused. The jury returned a verdict of guilty; and the defendant alleged exceptions.

A. J. Jennings, for the defendant.

F. B. Fox, Assistant District Attorney, for the Commonwealth.

RUGG, C. J. This is a complaint against the defendant as superintendent of the Davol Mills for employing a woman contrary to the provisions of St. 1909, c. 514, § 48. This section limits the time during which minors under the age of eighteen years and women may be employed in labor in manufacturing and mechanical establishments, to fifty-six hours in each week, and to ten hours in each day, "unless a different apportionment of the hours of labor is made for the sole purpose of making a shorter day's work for one day of the week," except that where employment is by seasons the hours of labor in each week may exceed fifty-six, but not fifty-eight, if the total number of hours of such employment in any year shall not exceed an average of fifty-six hours in each week for the whole year, excluding Sundays and holidays. St. 1911, c. 484, by which the basis of the labor for each week has been reduced from fifty-six to fifty-four hours, was not in force at the time of the offense here complained of.

1. The constitutionality of a statute restricting the hours of employment of women and children in a single manufacturing service was upheld in 1876 by this court. *Commonwealth v. Hamilton Manuf. Co.* 120 Mass. 383. See also *Opinion of the Justices*, 163 Mass. 589, at 594. There can be no doubt as to the constitutionality of such a statute in its application to minors, who are not *sui juris*, and are in some respects wards of the State. See *Berdos v. Tremont & Suffolk Mills*, 209 Mass. 489. But the subject latterly has been debated rather widely, so far as applicable to adult women. There appears, however, to be no ground to doubt the soundness of our somewhat early decisions, and we adhere to it, both on reason and on the doctrine of *stare decisis*. Recently such statutes have been held to be valid under the Federal Constitution and generally in other jurisdictions. *Muller v. Oregon*, 208 U. S. 412, affirming *State v. Muller*, 48 Ore. 252. *Wenham v. State*, 65 Neb. 394. *State v. Buchanan*, 29 Wash. 602. *Commonwealth v. Beatty*, 15 Penn. Sup. Ct. 5, 17. *Withey v. Bloem*, 163 Mich. 419. *Ritchie v. Wayman*, 244 Ill. 509.

People v. Bowes-Allegretti Co. 244 Ill. 557. We do not regard *Burcher v. People*, 41 Col. 495, and *In matter of Mary Maguire*, 57 Cal. 604, which were decided according to peculiar constitutional provisions of these States, as bearing upon the question. In *Ritchie v. People*, 155 Ill. 98, a statute limiting the hours of labor for women to eight hours in each day and forty-eight hours in each week was held unconstitutional. On the distinction between the eight-hour and a ten-hour day, a distinction which in reason seems rather difficult to maintain, this case is not treated plainly by the court as overruled in *Ritchie v. Wayman*, 244 Ill. 509, where an act restricting such labor to ten hours in each day was upheld. But however that may be, it is certain that the difference between an act of the Legislature which permits women to labor in designated employment fifty-six hours in each week, and one permitting such labor for not more than sixty hours is so small as not to require a difference in the application of constitutional principles. Whatever may be the bounds fixed by the natural and constitutional rights to freedom of all individuals, including women, to the power of the Legislature to determine maximum hours of labor for women, it is clear that the present statute does not transgress those bounds.

2. This statute plainly prohibits the employment of women longer than fifty-six hours in any week, or longer than ten hours in any day, save for the purpose of securing shorter hours of labor on one day within the maximum of fifty-six hours per week, and for other purposes not here in issue. The complaint at bar is not framed upon that part of the statute. It is not claimed that the defendant employed any laborers for a longer period in any day or week than the law permits.

3. The crime which is charged is that first created by St. 1902, c. 435, and retained in subsequent re-enactments. It is necessary to examine with exactness precisely what is inhibited. The first part of said § 48 provides that "No child and no woman shall be employed in laboring" in the specified occupations except as permitted. It then enacts that "Every employer shall post in a conspicuous place in every room in which such persons are employed a printed notice stating the number of hours' work required of them on each day of the week, the hours of commencing and stopping work, and the hours when the time allowed for

meals begins and ends . . . [with a further provision in said c. 514, § 67, that the meal hour shall be the same where the women and children employed number five or more, save that an exception is made in § 69 of certain employments where continuous processes are required]. The employment of such person at any time other than as stated in said printed notice shall be deemed a violation of the provisions of this section," with exceptions not here material.

The meaning of this language must be determined. It ought to be read in the light of the general purpose of the Legislature in enacting it. That purpose was to establish the rights of children and women, who are treated as in a certain sense dependent and under an industrial disadvantage by reason of age and sex, to regular hours of employment for limited and designated periods of time with fixed intervals for rest and refreshment, and to protect them in the enjoyment of the rights thus established, to the end that the health and endurance of the individual may be insured and the ultimate strength and virility of the race be preserved. The requirement for the posting of notices where "such persons" are employed means wherever women and children are regularly employed for any substantial number of hours daily. It applies to every employer of "such persons." Both phrases are wholly general and without restriction or exception. It is not fairly open to the construction that it applies only to establishments where "such persons" are regularly employed more than ten hours in any one day, and that it does not affect those when on no day is there employment for more than ten hours. All those, who in manufacturing and mechanical establishments employ women and children in practically permanent labor, are required to post the notices which fix definitely the hours of work. As was pointed out in *Commonwealth v. Osborn Mill*, 180 Mass. 83, statutes of that character are not intended, either by letter or in spirit, to apply to any except women employed permanently, who labor for full working days, whatever the length may be. The statute does not apply to those who are hired temporarily or intermittently to perform tasks subsidiary to the main business of the factory or shop. A woman engaged for an hour or two a day sweeping the floors or washing windows, although perhaps technically in some aspects a laborer, would not come

within the purview of the statute, having regard to the ends to be subserved by it and the general grounds on which its constitutionality is sustained. But the requirement of the statute is that as to those regularly employed for the full shop day there must be a posting of the notices with the definite statement of the hour of starting, the limits of time for the intermission, and the hour of closing. These hours may be fixed by agreement of parties with absolute freedom within the maximum permitted save in a particular not here material. But when once fixed they must be rigidly adhered to. Employment of women and children outside the hours thus agreed upon is prohibited, and infraction of this prohibition is punishable as a crime.

4. This being the meaning of this section of the statute, the question is whether as thus construed it is constitutional. Arguments which would be decisive against its constitutionality if it applied to men as well as to women (*Lochner v. New York*, 198 U. S. 45, *Opinion of the Justices*, 208 Mass. 619, 622) may be laid aside. It is to be noted that it applies only to "manufacturing" and "mechanical" establishments. These words as defined in § 17 of the same act include those places popularly known as mills and shops, where, as matter of common knowledge, continuously operating machinery and constant service by attendants throughout the whole day are not essential to economical manufacture, and where ordinarily machinery is stopped for the noon hour. The statute does not extend in that respect to stores or to branches of manufacture or industry where continuity of labor by somebody is necessary from the beginning to the end of the work day. Other provisions are made for these classes of employment. See said c. 514, §§ 47, 68, 69, 70, which recognize the practical difficulty, if not impossibility, of requiring a suspension of all labor by regular employees during a midday or other meal intermission, and do not prohibit labor except before the beginning and after the end of the established working day. A classification of employment of women and children confined to manufacturing and mechanical establishments of this character is within the legislative power. Such a classification is sustained as valid when it can be ascertained to rest upon some sound principle, and to be not arbitrary in its nature. There is a legislative right of reasonable selection among various businesses and indus-

tries for the operation of laws general in their application on the basis chosen, and so long as this selection is not arbitrary, whimsical, unnecessary or unreasonable, it cannot be pronounced unconstitutional. The classification of manufacturing establishments alone for limitation of hours of labor by women was held constitutional in *Commonwealth v. Hamilton Manuf. Co.* 120 Mass. 388. See also for kindred illustrations of the principle, in addition to cases heretofore cited, *Dewey v. Richardson*, 206 Mass. 480; *Griffith v. Connecticut*, 218 U. S. 568; *Lindsley v. Natural Carbonic Gas Co.* 220 U. S. 61; *Atkin v. Kansas*, 191 U. S. 207; *Chicago, Rock Island & Pacific Railway v. Arkansas*, 219 U. S. 458; *Assaria State Bank v. Dolley*, 219 U. S. 121.

It may be conceived that the purpose of requiring by the imposition of a penalty a strict observance of the posted hours of labor was to facilitate the enforcement of the law. It might be regarded as difficult to detect violations of the prohibition against employment for a longer time in the day or week than is allowed, while it would be comparatively easy to observe working outside of designated hours. Although difficulty in enforcing a statute can never justify unconstitutional "modes of accomplishing a laudable purpose, and of carrying into effect a good and wholesome law" (*Fisher v. McGirr*, 1 Gray, 1, 81), reasonable regulations to this end should be upheld. When the constitutionality of the statute limiting the hours of labor of women is settled, the means by which the aim of the statute may be forwarded within reasonable bounds are matters for legislative determination. This statute requires the hours of labor to be stipulated in advance, and then to be followed until a change is made. It does not by its terms establish a schedule of hours. This is left to the free action of the parties. Nor does it in the sections now under consideration restrict the right to labor to any particular hours. See *People v. Williams*, 189 N. Y. 181. It simply makes imperative strict observance of any one table of hours of labor while it remains posted.

The end of the statute is the protection of women within constitutional limits, and the requirement that the hours posted in the notice shall be followed is a means to effectuate the attainment of that end. That it in substance also requires performance of the contract implied from laboring under the notice does not

detract from the force of the prohibition. See *Ellis v. United States*, 206 U. S. 246, 255. It is not an impairment of the freedom of contract of the citizen to require that certain terms of a contract shall be posted in such form as not to be subject to mistake or dispute. This in principle is going no further than the statute of frauds goes. The property of the woman in her labor is not taken away, nor are the privileges and immunities of citizenship unduly abridged thereby. The rights of the employer are secured against the whim, caprice, mistake or ill-will of the laborer by § 70 of the act, which requires actual knowledge or consent on the part of the employer or his superintendent or overseer or agent to the violation of the time fixed in the posted notice before there can be guilt. This statute is regulation to a small detail; it is close to the line, but we cannot say that, the end being constitutional, this means of reaching that end are unreasonable, unnecessary or arbitrary, and hence beyond the power of the Legislature. The section of the statute under which this complaint is made, taken in connection with the other provisions to which we have referred, is not obnoxious to the Constitution of the United States or of this Commonwealth.

5. The complaint is sufficient in form. It alleges that the woman, whose employment outside of the hours posted in the notice is charged, was "required to work in laboring during the hours set forth in said notice," and thus avoids the defect which was held to be fatal in *Commonwealth v. Osborn Mill*, 180 Mass. 88. It alleges also that the defendant, being then and there the superintendent of a named manufacturing corporation, "did then and there employ in laboring in said mill" a certain woman. This is a sufficiently direct and positive averment, that the defendant employed the woman in his capacity as superintendent, and brings him within the substance of the description "as superintendent . . . for another" used in § 49 of said c. 514. Nothing is left to inference or implication as in *Commonwealth v. Dunn*, 170 Mass. 140, 142, relied on by the defendant.

6. The evidence on which the defendant was found guilty appears to be meagre. But in view of decided cases it is not so slight as to be capable of being pronounced insufficient. It could not have been ruled rightly that the defendant did not employ the woman. The word "employ" is used in divers significations,

such as to have work or to make use of the service of another. *Bingham v. Scott*, 177 Mass. 208, 211. In this sense it cannot be said the defendant as superintendent did not employ Nora Callahan by allowing her to work in the carding room of the mill. The concession by the defendant that as superintendent of the Davol Mills he had general charge of the operations of the mill, and that the overseers were subject to his orders could have been found to make the defendant as responsible for the act of an overseer in permitting or consenting to the work of Nora Callahan as he would have been if himself the employer. This means that he might have been found guilty, even though ignorant of the specific act in question. But he could have been held liable for such an act by one of his overseers only if he participated in the prohibited act, or authorized, approved or countenanced it in such a way as to assume initial responsibility for it. It must be assumed that adequate and comprehensive instructions were given upon this point. The only question raised by the defendant in this connection is that there was not sufficient evidence to warrant a conviction. This ruling could not have been given in view of *Commonwealth v. Nichols*, 10 Met. 259, *Commonwealth v. Briant*, 142 Mass. 463, *Commonwealth v. Stevens*, 153 Mass. 421, and *Commonwealth v. Riley*, 193 Mass. 60.

The other exceptions are either expressly waived or treated as waived because not argued.

Exceptions overruled.

750-155 F. WILLIAM OESTING vs. CITY OF NEW BEDFORD.

Bristol. October 23, 1911. — January 2, 1912.

Present: RUGG, C. J., HAMMOND, BRALEY, & DECOURCY, JJ.

Deed. Municipal Corporations, Officers and agents. Equity Jurisdiction, To relieve against a forfeiture, Accident or mistake.

The owner of certain lots of land with buildings thereon on a February 23 executed and delivered to a city a deed conveying "certain lots or parcels of land," describing them by metes and bounds. Immediately before the habendum clause was the following: "All buildings to be removed from these premises on

or before July 1 next by the grantor or his assigns." There was no other mention of buildings in the deed. The habendum clause conveyed the "premises with all the privileges and appurtenances thereto belonging." *Held*, that it was the intention of the parties to the deed that the buildings should belong to the grantor if he severed them from the land on or before July 1, and otherwise that they should remain a part of the realty.

At the hearing of a suit in equity to enjoin a city from claiming ownership in certain buildings on land which the plaintiff had sold to it and from preventing a removal of the buildings by the plaintiff, there was evidence tending to show the following facts: The plaintiff on February 28 of a certain year had executed and delivered to the city a deed conveying the land by metes and bounds and containing before the habendum clause the following: "All buildings to be removed from these premises on or before July 1 next by the grantor or his assigns." The plaintiff had had several interviews with the mayor of the city before July 1 as a result of which the mayor, at a full meeting of the board of aldermen and in the presence of the plaintiff, stated that the plaintiff "would be unable to get away from the premises by the first of July" and that "if there were no objections" an extension would be granted. Some questions were asked by two aldermen but no objection was made. It was admitted that the records of the board of aldermen contained no reference to any discussion or action on the matter. The plaintiff did not begin to remove the buildings until September. The presiding judge ruled that "on all the evidence the plaintiff could not recover." *Held*, that the ruling was not erroneous, because, while the parties by agreement could have extended the time within which the buildings could have been removed, there was no evidence that such an agreement was made with the plaintiff by any officer of the city having authority to make it.

At the hearing of a suit in equity to enjoin a city from claiming ownership in certain buildings on land which the plaintiff had sold to it and from preventing a removal of the buildings by the plaintiff, there was evidence tending to show the following facts: The plaintiff on February 28 of a certain year had executed and delivered to the city a deed conveying the land by metes and bounds and containing before the habendum clause the following: "All buildings to be removed from these premises on or before July 1 next by the grantor or his assigns." The plaintiff in April made "everything ready as far as he could" for the moving of the buildings, but was unable to get a mover. He thereupon several times interviewed the mayor and in his presence the mayor laid the matter before the board of aldermen, saying that "if there were no objections the extension would be granted." There were no objections and no formal action was taken. In September for the first time the plaintiff procured the services of a mover, but the city denied that he then had any right to the buildings. The presiding judge ruled that "on all the evidence the plaintiff could not recover," and reported the case to this court for a determination of the correctness of the ruling, without making any findings of fact. *Held*, that the plaintiff had shown no equitable circumstances of accident or mistake under which relief should be given.

BILL IN EQUITY, filed in the Superior Court on October 11, 1910, seeking to enjoin the defendant "from claiming title to" certain buildings upon land conveyed by the plaintiff to the defendant by a deed containing the stipulation hereinafter set

out, "and from injuring and destroying the same and from hindering, opposing, or obstructing the plaintiff from removing or moving or continuing to remove the said buildings from the defendant's land."

The case was heard by *King, J.* It appeared that by a deed acknowledged on February 28 and recorded on March 2, 1910, the plaintiff conveyed to the defendant "the following certain lots or parcels of land situated in said New Bedford," the deed describing them by metes and bounds. After the description of the lots, the deed contained the following: "All buildings to be removed from these premises on or before July 1st next by the Grantor or his assigns. To have and to hold the granted premises with all the privileges and appurtenances thereto belonging to the said Grantee, the City of New Bedford, and its successors and assigns, to their own use and behoof forever."

There was no other mention of buildings in the deed.

The plaintiff testified that at the time of the conveyance there were three buildings on the land; that he owned land about four hundred feet from the location of the buildings and had made preparations to place them there; that on June 22, 1910, he applied to the mayor and aldermen of the defendant for permission to move the three buildings to his other land. It appeared from the records of the board of aldermen that the permission was given him on that day.

The plaintiff further testified that he began operations on the buildings in April and removed all the foundations around them, taking out the curbing and large stone posts and a fence, and getting "everything ready as far as he could in April;" that there was only one building mover in New Bedford who could handle these buildings and that was one Hathaway; that outside of New Bedford the nearest movers were in Fall River and Brockton; that the plaintiff tried to get Hathaway to move the buildings several times between April and July 1, but could not get him because his timbers were all tied up and he "was driven up with work and was busy;" that it was impossible for Hathaway to move the houses or to do anything about them until he began work on them in September; that the plaintiff tried to get the movers from Fall River and Brockton but could not secure them "as they were too busy and were tied up with work," doing some

work for Hathaway; that the plaintiff told Hathaway that the buildings had to be away by July 1; that it was the plaintiff's intention to remove these buildings before July 1; that the plaintiff saw the mayor with reference to the removal of the buildings several times between June 21 and September 1; that the plaintiff attended the meeting of the board of aldermen on June 22, 1910, the full board being present, when "the mayor, in the presence of the full board, said that several applications to extend the time had been made by the owners of buildings on the land bought by the city," naming the plaintiff among others, "and that the parties would be unable to get away from the premises by the first of July, and that . . . if there were no objections the extension would be granted; that no objection was made, the full board of aldermen being present; that one of the aldermen . . . asked if the city was suffering in any way and if there was any harm done by these buildings not being got away by the first of July, and the mayor said that there was no harm done, that the city couldn't widen the street yet, and had no use for the land, and wasn't suffering in any way; that" another alderman "asked the same question and received the same response;" and that after the meeting the plaintiff saw the mayor a number of times previous to September 1 about the matter.

It was admitted that the records of the board of aldermen contained no reference to a discussion or of any action on the matter of the delay in the moving of the buildings.

The plaintiff in the middle of September moved two of the buildings to other land of the defendant, leaving one on the land in question.

On October 1, 1910, the defendant's solicitor in response to a request from the defendant's clerk of committees gave a written opinion that the plaintiff, "having failed to remove the buildings within the time which he stipulated in his option and the deed given the city, has parted with any right to claim the houses as property received to himself and the same belong to the city of New Bedford."

The foregoing is in substance all the evidence introduced at the hearing.

At the close of the evidence, the presiding judge "ruled, at the request of the defendant, that on all the evidence the

plaintiff could not recover, — saving the plaintiff's rights;” and at the request of the parties reported the case to this court “on the agreement that if the ruling was right (on all the evidence that was admitted, and all that was excluded but should have been admitted) then the ruling is to stand and a decree is to be entered for the defendant, with costs; if the ruling was wrong (on all the evidence that was admitted and all that was excluded but should have been admitted) then a decree is to be entered for the plaintiff with costs.”

J. W. Cummings, (*C. R. Cummings* with him,) for the plaintiff.

B. B. Barney, for the defendant.

BRALEY, J. The plaintiff's title to the buildings rests upon the construction of the deed under which the city acquired the freehold. *Noble v. Bosworth*, 19 Pick. 314. *Miller v. Washburn*, 117 Mass. 871. By the unambiguous language of the grant “certain lots or parcels of land” are conveyed, and under the terms of this description the estate included the buildings. *First Parish in Sudbury v. Jones*, 8 Cush. 184, 189. If the subsequent clause immediately preceding the habendum, “all buildings to be removed from these premises on or before July 1st next by the grantor or his assigns,” leaves no doubt of the intention of the parties, that they were to belong to the plaintiff, yet until severed they would not become his personal property. But if for the purpose of severance the right of entry and removal are implied, it is also plain, that unless the right was exercised within the period the soil and buildings were to remain united. *Washington Mills Emery Manuf. Co. v. Weymouth & Braintree Mutual Fire Ins. Co.* 135 Mass. 508. *Poor v. Oakman*, 104 Mass. 309. *Perkins v. Stockwell*, 131 Mass. 529. *Barry v. Woodbury*, 205 Mass. 592. The plaintiff's separate property in the buildings as chattels, depended therefore upon compliance with the condition.

It is specifically averred in the answer, and appeared in the report, that the plaintiff failed to effect a severance before the date of termination, and while the parties by agreement could have extended the time, the interviews or negotiations which the plaintiff had with its various municipal officers did not operate as an extension binding upon the defendant. St. 1847, c. 60,

§§ 7, 8, 10. *Wormstead v. Lynn*, 184 Mass. 425. *Adams v. County of Essex*, 205 Mass. 189.

The plaintiff invokes the rule, that equity will relieve against a forfeiture, and that on this ground alone the bill can be maintained. But the parties dealt on an equal footing, and the plaintiff was the grantor. It may be inferred from his evidence that he intended to preserve and to remove them to another location, and not to demolish them, and take away the materials. The length of time, however, which might be required, and their value if preserved, were important factors which he must be presumed to have considered in making the sale, and it was within his power by an appropriate stipulation to have guarded against the consequences of a default, if the period reserved should prove to be insufficient. *John Soley & Sons v. Jones*, 208 Mass. 561, 566. The nature of the contract having expressly made the time of performance essential, and his right to the property dependent upon it, the plaintiff shows no equitable circumstances of accident or mistake under which relief should be given. *Mactier v. Osborn*, 146 Mass. 399, 402. *Baltimore City Bank v. Smith*, 3 G. & J. 265. *Brown v. Vandergrift*, 80 Penn. St. 142. *Wells v. Smith*, 2 Edw. Ch. 78. *Baxter v. Lansing*, 7 Paige, 850. *Klein v. New York Life Ins. Co.* 104 U. S. 88. *Davis v. Thomas*, 1 Russ. & M. 506.

If the right of separation had been exercised seasonably, although the removal had been accidentally postponed beyond the limitation, the question argued by the plaintiff, whether, compensation to the defendant in damages being practicable, equitable relief should be granted, would have been presented. *Clafin v. Carpenter*, 4 Met. 580, 582, 583. *Gates v. Johnston Lumber Co.* 172 Mass. 495. *Henry v. Tupper*, 29 Vt. 358. It is not open on the record and the result is, that under the reservation in the report, the bill must be dismissed with costs.

Decree accordingly.

GORTON-PEW FISHERIES COMPANY *vs.* JAMES E. TOLMAN & another.

Essex. November 8, 1911. — January 2, 1912.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DeCOURCY, JJ.

Land Court, Exceptions. Way, Private. Easement. Devise and Legacy.

On exceptions to a decision of a judge of the Land Court, where the bill of exceptions set forth all the evidence and stated that a decision of the trial judge which contained findings of fact might be referred to, and where the findings of fact were warranted by the evidence and by inferences that might have been drawn therefrom, it was *held*, that such findings were conclusive and that this court could not consider whether they were supported by the weight of the evidence or whether a different inference could have been drawn from the facts.

The owner of a large tract of land, bounded northerly on a street and southerly on a harbor, fenced off a portion of it which bordered on the street and used it for homestead purposes, erecting thereon a house and stable and making a garden. He used the remainder of the land for building purposes and constructed from the street toward the harbor a private way, which he intended for use in connection with all parts of his homestead property and also of his business property and which was the only reasonable means of access to the stable and garden lots. He then made a will, in the second clause of which he gave the "homestead . . . as now enclosed" to his wife, and, after clauses in which he completed his testamentary dispositions, in a sixteenth clause he directed "that the garden situate southerly of the dwelling house . . . shall be a part of the homestead given my wife in the second item . . . and I do hereby devise said garden to my said wife as a part of said homestead." One, who after the death of the testator had acquired the homestead property by means conveyances from the testator's wife, erected on a part of the house lot and on the stable and garden lots a theatre, and claimed a right to use the private way in connection with it. *Held*, that it was the intention of the testator to give to his wife with the land an easement of passage over the way, which was not restricted to the use of the gates then in the enclosure nor to domestic purposes, but was to be left to be adapted to the convenience and desires of occupants of the estate from time to time; and therefore that her successor in title had a right to use the way in connection with his theatre.

Discussion by SHELDON, J., of the law with regard to easements which, although not expressly described in an instrument of conveyance, pass with the dominant estate by implication because they are reasonably necessary to its use and enjoyment, are open and continuous and are in use at the time of the conveyance.

PETITION, filed in the Land Court on July 28, 1907, for the registration of the title to land in Gloucester fronting southerly on Gloucester harbor and northerly on Main Street. The respondents claimed the right to use a way through land of the

petitioner in connection with land owned by them fronting on Main Street and immediately east of the way and the land of the petitioner.

In the Land Court the case was tried before *Davis, J.* He found the following facts in substance:

In 1852 the land of the respondents and the greater part of that of the petitioner was included in a tract of pasture land, known as Trask field, which then was purchased by John Pew, a Gloucester merchant engaged in the fisheries. The field sloped up from Main Street, at which point it was low and springy, over a rocky incline, and thence dropped off to the harbor. On the water front, Pew built wharves and docks with a flake yard to the north thereof. Running from Main Street to the wharves near the west line of the Trask field, he built the way now in question, leaving, however, a narrow strip of land at the north-westerly corner for a store, now contained in a brick block, and for a yard and for fish flakes, and at the northeasterly corner a tract of land having a frontage of sixty-five feet on Main Street, a depth southerly along the way in question of three hundred and twelve feet, and a width on the southerly end of sixty-two feet, for a house lot, stable and garden comprising his homestead estate which is now the property of the respondents. This homestead estate he filled and graded, building a mansion house on the front part facing on Main Street, with a stable in the rear and a garden which he cultivated and in which he also had a hen house and yard. The portion of the lot on which the house was built was filled in so that the house stood above the street and way, with bankings and some ornamental shrubbery about it, and there was a wall surmounted by an ornamental fence along Main Street, with gates for foot passengers opening to walks leading to the front and back doors of the house, to the cellar doors and cellar windows, and to stone steps to the stable yard, and there was a wall surmounted by a similar fence along the way in question as far south as an embankment wall which was between the house and the stable. Back of the house the land made an abrupt drop to the stable. The embankment wall was surmounted by a low fence with a gate in it between the house and the stable and stable yard, and a flight of stone steps leading down from the house to the stable yard. A trellis and fence with an opening

in it separated the stable and stable yard from the garden. Access to the stable, stable yard and garden was had from the private way in question through a swing gate for teams opening on to a driveway to the stable yard and stable, located opposite the stable and large enough to admit a wagon, the opening thus made into the driveway being in a high slat fence which ran from the embankment wall around the west, south and east sides of the property now owned by the respondents. The fences above mentioned completely enclosed the house, stable and garden.

Pew lived in the house and occupied the whole of the premises now owned by the respondents as his homestead until his death. Until 1868 he kept in the stable a horse and carriage for his own use, and also at times one used in the firm business. In 1868 he had a runaway accident which lamed him for life, and thereafter he kept no horse. From then on the stable was used mostly for storage purposes, and in the stable yard and driveway were from time to time kept portable chicken coops. Access to the stable, stable yard and garden was, however, still had as occasion might require through the gates opposite the stable which opened upon the way in question. In going between his house and place of business, Pew sometimes came out his side door, down the stone steps to the stable yard, and thence out by the stable gate and down the way in question to the wharves. Sometimes, however, he went out through his front gate to Main Street and around by the store. As he grew older he used the stone steps and stable gate less and less. It appeared that the gates opposite the stable opening from the way were locked at times to prevent boys from getting into the yard to the magnolia and fruit trees, and that in the later years of Pew's life the use of the gates for any purpose was very infrequent; but the judge found that the gate was not permanently closed up. The use of the way so far as Pew personally was concerned in his actual occupation of the premises was largely discontinued, but there was no abandonment of the use of the way in connection with the premises or permanent interruption thereof.

In 1868 Pew bought additional land on Main Street adjoining the store on the west, and a brick block was erected covering that lot and the piece of the Trask field formerly occupied by the

store. He also bought some house lots south of the store which fronted on an adjoining street called Vincent Street. For many years and until his death the block and the wharf properties were rented by Pew to the firm in which he was the principal partner, and the way was in constant use in connection with the firm properties, constituting the principal means of access to the wharves and flake yards, and the only entrance to the side and back doors of the store and block and to a yard and small building back of the store. Cottages were erected on the house lots which were rented to employees of Pew or of the firm. The tenants used the way in question. After 1879 the way was and now is defined on its west side by fences and a wall and the side of the brick block. The way in question was always kept in repair by the firm, and the cost charged into the firm's expenses, along with rent, in their accounts with Mr. Pew.

In Pew's lifetime or at his death a driveway ten feet wide, as far as the stable yard and stable, could have been built from Main Street over the front lot now of the respondents, which was worth about \$10,000, for about \$150. Such a driveway would have been very disadvantageous to the remainder of the house lot. A way ten feet wide would not have been adequate for the development and use of the stable and garden lots, either for business purposes or for cutting up into house lots, and a way twenty feet wide running back into the garden for the development and use of the property would have cost from \$750 to \$900 and would have greatly impaired the availability, use and value of the garden lot by narrowing the lots into which the garden could have been divided. The homestead estate at the time when Pew's will was made and at his death was in a residential and business neighborhood.

Pew made a will in 1876, by the second paragraph of which he left his "homestead . . . in said Gloucester as now enclosed" to his wife, and by the sixteenth paragraph he directed "that the garden situated southerly of the dwelling-house occupied by me . . . shall be a part of the homestead given my wife in the second item of the will, and I do hereby devise said garden to my said wife as a part of said homestead." He died in March, 1890, and his will was proved. His widow occupied the homestead, including the house, stable and garden, until her

death in December, 1890, when she devised it to her daughter, who occupied it for nearly ten years, and from whom it passed in 1900 to the respondents by mesne conveyances duly recorded, each containing the usual habendum clause "with all the privileges and appurtenances thereto belonging." The fee to the way and to the other land described in the petition for registration was devised to the testator's sons.

The respondents upon acquiring title levelled off the front land and erected a permanent wooden building used as a theatre and opera house, covering the middle portion of the property, including the southerly end of the house lot, the whole of the stable yard, and the northerly end of the garden, and having its stage entrances and only intended means of access by teams on and from the way in question. They removed the gates and the fence along the way. At the place where the gate opposite the stable formerly was located, the theatre building completely blocks entrance from the way to the property, except for the purpose of entering the theatre. The theatre building also blocks all access to the stable by horses or wagons. The respondents have used all the land between the house and the way in question, a width of from twenty-one to twenty-three feet, as an entrance for spectators from Main Street and have levelled it and covered it with cement for that purpose. The house and stable are still standing in their original location, and are in use by the respondents. In 1902 a cottage house was moved on to the southerly part of the garden lot by the respondents and is occupied by them.

The judge found as a fact that at the time the will was made and at the date of the testator's death, the only reasonable means of access to the stable and garden lots was by means of the way in question, and ruled that under the will of John Pew his widow took as appurtenant to the homestead and garden specifically devised to her under the above described second and sixteenth clauses of the will an easement of passage to and from Main Street for all convenient purposes in the land within the limits of the way in question, and that the respondents by mesne conveyances are now the owners of the estate so devised to her. A decree was ordered accordingly; and the petitioner alleged exceptions.

The bill of exceptions contained a recital of all the material facts in evidence and a statement that a decision of the trial judge's finding, which contained a detailed statement of facts found by him, might "be referred to."

H. T. Lummus, (*C. N. Barney* with him,) for the petitioner.

C. A. Russell, for the respondents.

SHELDON, J. No claim is now made that the respondents have any title to the fee of the roadway in question, or that they have any right of way over it by estoppel under the rules laid down in such cases as *Motley v. Sargent*, 119 Mass. 231, 236; *Lemay v. Furtado*, 182 Mass. 280; *McKenzie v. Gleason*, 184 Mass. 452; *Gould v. Wagner*, 196 Mass. 270; and *Downey v. H. P. Hood & Sons*, 203 Mass. 4. It is not denied that the fee of the roadway, subject to whatever rights of passage have been created therein, vested in the petitioner's grantors, the sons of John Pew, by the devise to them of his business property. *Cleverly v. Cleverly*, 124 Mass. 814. *Dudley v. Milton*, 176 Mass. 167. Nor do the respondents claim that they are entitled to a way by necessity strictly so called. The main question is whether upon the findings made by the judge of the Land Court, so far as those findings were warranted, he was right in ruling that under the will of John Pew his widow took as appurtenant to the estate specifically devised to her an easement of passage over this way from Main Street to her rear land.

By the second clause of his will, Mr. Pew devised to his widow his "homestead situate on the southerly side of Union Hill in said Gloucester as now enclosed." After other and various devises and bequests, he provided in the sixteenth article of his will that the garden southerly of his dwelling house should be a part of the homestead given to his wife, and added, "And I do hereby devise said garden to my said wife as a part of said homestead." This included the stable and garden lot, to which as well as the dwelling house it is now claimed that the way is appurtenant. The judge at the trial found as a fact, from the other facts found by him, that at the time the will was made and at the date of the testator's death the only reasonable means of access to the stable and garden lots was by the way in question. As this was an inference which could be drawn from those facts, the finding is now conclusive, and we cannot con-

sider whether it is supported by the weight of the evidence or whether a different inference could have been drawn from those facts.

Upon this finding and the other facts stated in the exceptions and in the decision of the Land Court which is referred to therein, it appears to us that the devise to Mrs. Pew was intended to include the right of way which has been mentioned. This depends upon the intention of the testator, as gathered from the language which he has used, considered in the light of the circumstances as known to him, and with the help of all the evidence available to show what those circumstances were. *Leonard v. Leonard*, 2 Allen, 543, 545. *Bagley v. New York, New Haven & Hartford Railroad*, 165 Mass. 160, 164. As the way was laid out by him over his own land and was afterwards used by himself and those with whom he was connected, we must look at its origin and history, at the manner of its use, and the purpose with which it was wrought for travel, so far as that purpose was manifested by its situation, the manner of its construction, and the use which he himself made and allowed others to make of it. These facts have been found with some detail; and from them it was certainly proper, if indeed it was not necessary, to draw the inference that Mr. Pew built and maintained this roadway for the purpose of affording convenient access to all the parts of his property abutting upon it, including the garden and stable lot in the rear of his dwelling house, as well as the wharves at the end of the way and the business property, both what he first owned and what he afterwards acquired, lying upon the other side of the way. It also could well be found, as manifestly it was found, that he continued to have this intention during his lifetime, and to use the way in conformity therewith. It was under these circumstances that he made his will, and in the first operating clause thereof after the appointment of his executors devised to his wife his homestead "as now enclosed." Then, after having almost completed his testamentary dispositions, his mind reverted to the provision made for his wife, and he seems to have feared that under the language he had used she would not take all that he desired her to have, or else to have resolved to make a more liberal provision for her; and he accordingly expressly devised to her the garden which he had used

in connection with the house. In this clause he omitted the limitation which he previously had made, that she was to take the property "as now enclosed." On the contrary, after giving to her in the rest of this clause his household furniture and other similar articles, he added the significant words, "intending that my wife shall have my said homestead and the personal property owned by me in the dwelling house of the same as it shall be at my decease." Here he plainly used the word "homestead" with a much broader meaning than he applied in the clause last quoted to the word "dwelling-house," and showed that he intended her to take the whole estate with the whole beneficial use and enjoyment thereof. But upon the findings of fact it appears that both when he made his will and when he died the possession of this easement was necessary to such full use and enjoyment. We cannot avoid the conclusion that he expected this roadway to be preserved just as he had laid it out, and intended to give to his widow an easement therein for the benefit of her house and land, as a part of his devise to her. *Otis v. Smith*, 9 Pick. 298. *Eliot v. Carter*, 12 Pick. 436, 442. *Hunt v. South Parish in Braintree*, 12 Met. 127. *Aldrich v. Gaskill*, 10 Cush. 155. *Melcher v. Chase*, 105 Mass. 125. *Kimball v. Ellison*, 128 Mass. 41. *Hammond v. Abbott*, 166 Mass. 517. *Dudley v. Milton*, 176 Mass. 167. *Millerick v. Plunkett*, 187 Mass. 97. But the court, in determining the rights of parties under a will, seeks first to ascertain the real intention of the testator, and will give effect to that intention unless prevented by some rule of property or fixed principle of law. *McCurdy v. McCallum*, 186 Mass. 464, 468. *Crapo v. Price*, 190 Mass. 817, 820. *Gray v. Whittemore*, 192 Mass. 867, 874. *Boston Safe Deposit & Trust Co. v. Blanchard*, 196 Mass. 85, 88. *Jewett v. Jewett*, 200 Mass. 810, 817. *Ware v. Minot*, 202 Mass. 512, 516.

There is no rule of property or principle of law to prevent us from carrying out the intention of this testator. On the contrary there is much authority for saying that if Mr. Pew had in his lifetime made simultaneous conveyances of his property in the same language that he used in his will, this roadway, visibly wrought on the surface of the ground, would have been subjected to an easement of passage in the hands of its grantee. *Scott v. Moore*, 98 Va. 668. *Phillips v. Phillips*, 48 Penn. St. 178.

Cannon v. Boyd, 78 Penn. St. 179. *Overdeer v. Updegraff*, 69 Penn. St. 110. *Liquid Carbonic Co. v. Wallace*, 209 Penn. St. 457. *Brakely v. Sharp*, 2 Stockton, 206. *Tooth v. Bryce*, 5 Dick. 589. *Goodall v. Godfrey*, 53 Vt. 219. *Mason v. Horton*, 67 Vt. 266. *McElroy v. McLeay*, 71 Vt. 896. *Dunklee v. Wilton Railroad*, 24 N. H. 489. *Butterworth v. Crawford*, 46 N. Y. 849. *Simmons v. Cloonan*, 81 N. Y. 557. *Baker v. Rice*, 56 Ohio St. 468. *Morrison v. King*, 62 Ill. 80. *Cihak v. Klerk*, 117 Ill. 648. *Irvine v. McCreary*, 108 Ky. 495. *Jones v. Sanders*, 138 Cal. 405. *United States v. Appleton*, 1 Sumn. 492, 502. See also the elaborate note to the case of *Rollo v. Nelson*, 26 L. R. A. (N. S.) 315, in which this question is exhaustively treated.

This court, like some others, never has gone to the full length of some of the decisions above referred to; but the underlying principle has been recognized and upheld. *Atkins v. Bordman*, 2 Met. 457, 464. *Leonard v. Leonard*, 2 Allen, 543, 545, and 7 Allen, 277, 288. *Oliver v. Dickinson*, 100 Mass. 114. *Adams v. Marshall*, 138 Mass. 228, 286. *Case v. Minot*, 158 Mass. 577. *Pearson v. Spencer*, 3 B. & S. 761. *Brown v. Alabaster*, 87 Ch. D. 490. *Milner's Safe Co. v. Great Northern & City Railway*, [1907] 1 Ch. 208. It has indeed been said that the rule is to be applied with some strictness and only where the easement which is sought to be maintained, though not expressly granted, is yet necessary to the enjoyment of the estate which has been conveyed. *Johnson v. Jordan*, 2 Met. 234. *Carbrey v. Willis*, 7 Allen, 364, 369. *Randall v. McLaughlin*, 10 Allen, 366. *Buss v. Dyer*, 125 Mass. 287, 291. *Cummings v. Perry*, 169 Mass. 150, 155. *McSweeney v. Commonwealth*, 185 Mass. 371, 374. *Warren v. Blake*, 54 Maine, 276. *Dolliff v. Boston & Maine Railroad*, 68 Maine, 173. *Stevens v. Orr*, 69 Maine, 323. *Hildreth v. Googins*, 91 Maine, 227. *Whiting v. Gaylord*, 66 Conn. 337. *Standiford v. Goudy*, 6 W. Va. 364. *Pheysey v. Vicary*, 16 M. & W. 484. *Worthington v. Gimson*, 2 El. & El. 618. But the necessity thus required is not an absolute physical necessity, but merely such a reasonable necessity for the use and enjoyment of the dominant estate as has been found to exist here. *Leonard v. Leonard*, 7 Allen, 277, 288. *Pettingill v. Porter*, 8 Allen, 1. *Oliver v. Pitman*, 98 Mass. 46, 50. *Schmidt*

v. *Quinn*, 136 Mass. 575, 576. *O'Rorke v. Smith*, 11 R. I. 259. *Kelly v. Dunning*, 16 Stew. 62. But in such cases of the grant of an easement by implication, however much stress may be laid upon its reasonable necessity for the beneficial enjoyment of the estate granted, yet it is not, in the case of a way for example, strictly the necessity that creates the way, but the intention of the parties as shown by their instruments and the situation and circumstances with reference to which those instruments were made. *Nichols v. Luce*, 24 Pick. 102, 104. *In re West 177th Street*, 120 N. Y. Supp. 354. *Whitney v. Olney*, 3 Mason, 280. *Pearson v. Spencer*, 1 B. & S. 571. *Williams v. James*, L. R. 2 C. P. 577.

It is necessary also for the creation of such an easement that it should be open and continuous. And it has been said that the easement of a private way, being used only at more or less frequent intervals and without any visible mark upon the ground, is non-continuous and therefore will not pass where other easements, continuous in their nature and being such as would be readily apparent upon inspection, would pass. *Parsons v. Johnson*, 68 N. Y. 62, 65. *Bonelli Bros. v. Blakemore*, 66 Miss. 136. *Fetters v. Humphreys*, 4 C. E. Green, 471. *Young v. Pennsylvania Railroad*, 43 Vroom, 94, 98. *Kelly v. Dunning*, 16 Stew. 62. *Whiting v. Gaylord*, 66 Conn. 387. *Oliver v. Hook*, 47 Md. 301. *Francie's appeal*, 96 Penn. St. 200. *Suffield v. Brown*, 4 DeG., J. & S. 185. *Polden v. Bastard*, L. R. 1 Q. B. 156. But those decisions do not apply to this case. We have here a roadway of considerable width, situated in the residential and business part of a thriving city, used as appurtenant both to private residences and to business properties and wharves, running between well defined bounds, and actually built or wrought upon the surface of the ground. A glance would show that it was intended to be used and was in fact used for the purposes of a public street so far as concerned the accommodation of those who occupied properties abutting upon it or reached by it. As to Mr. Pew, who had laid it out and wrought it for travel, though not to the general public, it stood in the place of a public street. This case is distinguished from most of the decisions just referred to, and comes within the exception stated in some of them. It is directly within the language used in *Fetters v.*

Humphreys, 8 C. E. Green, 280, and the decision in *Rollo v. Nelson*, 26 L. R. A. (N. S.) 315. And in many of our own decisions already referred to, rights of way have been held to arise by implication.

It is necessary that the right should have been in use at the time of the grant of the principal estate. This was held in many of the cases already referred to. See also *Haverhill Savings Bank v. Griffin*, 184 Mass. 419; *Hart v. McMullen*, 80 Canada S. C. 245. But the Land Court has found that this was the case, and that there has been no abandonment of the use; and the occasional opening or closing of gates, with or without a fastening and for a longer or shorter time, raises only a question of fact which has been passed upon at the trial and which we cannot reopen.

Nor, for somewhat similar reasons, can we say that the right of the respondents to use this way is limited to the two gates by which entrance was had from the way into the garden and stable lot. The apparent and obvious purpose of Mr. Pew in constructing this way, so far as his homestead estate was concerned, was to provide accommodation for that estate, the particular mode of use being left to the convenience and desires of the occupants from time to time. This was the right which he enjoyed, and which he intended to pass to his widow by the broad language of his devise to her.

So, too, it cannot be said as matter of law, whatever might have been found at the trial as matter of fact, that the easement can be upheld only for domestic purposes. The right created was appurtenant to the homestead estate, and was not limited to any particular purposes. According to the finding of the Land Court and the ruling made thereon, "both at the time the will was made and at the time of the testator's death, the homestead as enclosed had, in actual use in connection with it and reasonably necessary to its enjoyment, access over the way for all purposes for which a private way could ordinarily and properly be used." So far as this is a finding of fact, we cannot review it; as a ruling, it properly followed from the findings which appear to have been made. *Salisbury v. Andrews*, 19 Pick. 250, 256. *Parks v. Bishop*, 120 Mass. 340. *Baldwin v. Boston & Maine Railroad*, 181 Mass. 166. And see *Fox v. Union Sugar Refinery*, 109

Mass. 292; *Goss v. Calhane*, 113 Mass. 423; *Boland v. St. John's Schools*, 163 Mass. 229, 237.

Abandonment is of course a question of fact. *New England Structural Co. v. Everett Distilling Co.* 189 Mass. 145.

There is no such fundamental change of use here as was shown in *Great Western Railway v. Talbot*, [1902] 2 Ch. 759, and similar cases.

It is to be observed that we have here the case of an easement passing by the plain intention of a testator, not solely by necessary implication, and not at all an attempt to create one by an implied reservation contrary to the terms of the grant itself. That would have presented a more difficult question, which need not here be considered.

The petitioner's main contentions have been disposed of by what has been said. Its requests for rulings, so far as they were refused and have not been dealt with already, seem to have become immaterial because the protases thereof were not found by the judge. We discover no error in their refusal.

The industry of the petitioner's counsel has collected many cases, not all of which have been cited though all have been examined, in which claims that easements had been created by implication upon the severance of estates previously held in a single ownership have been overruled. They seem almost without exception to have been decided either on the ground that no intent to create such easements had been manifested, or by reason of the absence of some one or more of the necessary grounds which have been stated. They do not furnish authority for the decision of this case.

Exceptions overruled.

HENRY B. LITTLE & others, trustees, vs. CITY OF
NEWBURYPORT.

Essex. November 9, 1911. — January 2, 1912.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DeCOURCY, JJ.

Charity, What constitutes benevolent or charitable institution, Exemption from taxation. Tax, Exemption. Trust. Young Men's Christian Association.

At the hearing of an action of contract in which was involved the question, whether the property of the Young Men's Christian Association of Newburyport was taxable, there was evidence tending to show that the association was a corporation without capital stock; that its purpose, as stated in its charter and constitution, was "the improvement of the spiritual, mental, social and physical condition of young men;" that its membership was made up of "active" and "associate" members; that any man above fifteen years of age who was a member in good standing of a Protestant Trinitarian church might become an active member; that only active members had a right to vote or to hold office; that any man over fifteen years of age of good moral character might become an associate member and enjoy all the privileges of the association other than voting and holding office; that the extent to which members might use some of the privileges of the association depended upon the amount of membership fee they paid; that there was no religious test applied to associate members and they included persons of the Roman Catholic and of all Protestant denominations as well as Jews and persons of no religious preference; that the association had a definite policy of religious work not confined to its members nor to its building, carried on considerable educational work, also not confined to members, with classes in fifteen or twenty different studies for which was charged a small fee insufficient to sustain the work; that there were classes for Polish residents of the city, both men and women, where no fee was charged and general instruction in elementary matters of clean living and good citizenship was given; that a reading room was maintained; that there were meetings for social purposes, entertainments, games, public receptions and sometimes shop receptions where men from different factories were entertained without cost to them; that some work was done which was charitable in the popular meaning of that word, mainly to assist young men, both members and non-members; that none of the work was done for profit; that no officer except the secretary received any compensation; and that the association depended for support for its work mainly upon subscriptions. *Held*, that the corporation was a benevolent or charitable institution within the meaning of those words in St. 1909, c. 490, Part I, § 5, cl. 8, the fact that some of its benefits were afforded only to its members, and the limitation of the privileges of becoming "active" members, of voting and of holding office not being material.

A fund, bequeathed to trustees for the purpose of paying the net income thereof "for the general purposes" of a Young Men's Christian Association which is a benevolent or charitable institution, is exempt from taxation under the provisions of St. 1909, c. 490, Part I, § 5, cl. 8.

CONTRACT for \$120.81, the amount of a tax and of costs assessed as of April 1, 1910, upon personal property in the possession of the plaintiffs as trustees under the will of Daniel S. Burley, and paid by them under protest. Writ dated November 16, 1910.

In the Superior Court the case was heard by *Schofield*, J., without a jury.

It appeared that the property upon which the tax was assessed was a fund of \$10,000 bequeathed to the plaintiffs in trust to pay the net income thereof to the Young Men's Christian Association of Newburyport "for the general purposes of said Association." That association was incorporated in 1884 under Pub. Sts. c. 115, its charter and constitution stating its purposes as they are stated in the second paragraph of the opinion. It owns and alone occupies a building which was a memorial gift to it.

There was evidence tending to show the facts stated in the opinion. At the close of the evidence the defendant asked the judge to rule "that upon the law and all the evidence, judgment must be entered for the defendant."

The judge refused so to rule and found for the plaintiff for \$124.65. The defendant alleged exceptions, which, after the resignation of *Schofield*, J., were allowed by *Raymond*, J.

A. Withington, for the defendant.

E. Foss, for the plaintiffs.

SHELDON, J. It may be scarcely possible under our statute (R. L. c. 12, § 5, cl. 3; St. 1909, c. 490, Part I, § 5, cl. 3) to lay down a general rule as to the character of the Young Men's Christian Associations which have now become so numerous. In each case the question will be whether the institution is in its character literary, benevolent, charitable or scientific within the meaning of those words in the statutes; and the answer will depend upon the language of its charter or articles of association, constitution and by-laws, and upon the objects which it serves and the method of its administration.

The purpose of this association is "the improvement of the spiritual, mental, social and physical condition of young men." The provisions of its constitution and by-laws, so far as they are shown, are designed and adapted to accomplish that purpose. Its membership is made up of active and associate members.

Any man above the age of fifteen years who is a member in good standing of a Protestant Trinitarian church may become an active member, and no others have the right to vote or hold office. Any man above the same age of good moral character may become an associate member and enjoy all other privileges. Each of these classes is subdivided into sustaining members, those who contribute at least \$10 a year; unlimited members who pay \$5 year and have all the privileges of the association; and limited members, who are not allowed to use the gymnasium and some other means of amusement of the association. Boys in the public and parochial schools are allowed full privileges upon payment of a smaller annual fee. There is no religious test applied to the associate members, and these include Roman Catholics, Jews, and all shades of religious preferences among Protestants, while many of them have no religious preference at all.

The association has a definite policy of religious work, which is stated with some detail in the exceptions. This is not confined to the members, and includes services in different school-houses and churches. It is an expense to the association.

It carries on considerable educational work, having maintained classes in fifteen or twenty different studies. In these a small fee is charged to pay for the hire of the teacher, the deficit being made up by the association. This work also is not confined to the members. It is done usually at a loss, never with a profit. There was testimony that "the association has tried to do more educational work than was apparently demanded. For instance, we have tried to do work for the shoe workers. We have had representatives from the silver factory and from all the shoe shops, and have had talks with them to try and improve their conditions. The association is always willing to do that work if they can get four, five or six men to join the classes. . . . There has not been a demand for the bookkeeping classes and writing classes and English classes. We have considered that every year, and provided the facilities, but have not had the response." The association has conducted classes in English for the Polish residents of Newburyport, both men and women. The city furnishes ward-rooms for this purpose, and all Poles are invited to come. They are taught by volunteers, and no fee is charged to the

pupils. They are also given talks on hygiene, civics, government, history and elementary mathematics; are given advice on the way to become citizens and upon other matters. There is also teaching in physical education, rowing, swimming, etc.

A reading room is maintained, which is open to the public.

There are also held meetings for social purposes, entertainments and games, public receptions, and sometimes shop receptions, wherein men from different factories are entertained without cost to them.

Some work is done which is charitable in the popular meaning of that word, mainly to assist young men, both members and non-members.

None of the work is done for profit. The association has no capital stock. None of its officers except its secretary receives any compensation. It depends for the support of its work mainly upon subscriptions.

It will be seen that this is not an almsgiving organization. But that is not decisive of the question raised. Charity in the legal sense "is not confined to mere almsgiving or the relief of poverty and distress, but has a wider signification, which embraces the improvement and promotion of the happiness of man." Braley, J., in *New England Sanitarium v. Stoneham*, 205 Mass. 835, 842. The association carries on a work which is intended and adapted for the improvement and elevation of young men, not only to bring them under good influences, but to promote their moral, mental and physical welfare. It incurs expense for this purpose, for meeting which it relies mainly upon charitable contributions. In its essence, though not giving charity in the narrow sense of that word, it is a benevolent or charitable institution within the meaning of those words in the statute. *McDonald v. Massachusetts General Hospital*, 120 Mass. 482, 485. *Mount Hermon Boys' School v. Gill*, 145 Mass. 189. *Molly Varnum Chapter, D. A. R. v. Lowell*, 204 Mass. 487. *New England Sanitarium v. Stoneham*, 205 Mass. 835.

The fact that some of the benefits of the association are afforded only to its members is not material under the circumstances now presented. The element of indefiniteness in the recipients of a bounty is of course essential to the character of a public charity. But the privilege of membership is open to all upon

payment of a moderate fee, without any other restriction than what has been stated as to sex and age. This of itself would be sufficient to meet the requirement. The limitation of the right to vote and hold office is not material. *McDonald v. Massachusetts General Hospital*, 120 Mass. 432. *Sherman v. Congregational Home Missionary Society*, 176 Mass. 349. *Masonic Education & Charity Trust v. Boston*, 201 Mass. 320. Moreover the judge at the trial could find that the dominant purpose of the association was its work for the public good, and that the work done for its members was the means adopted for this purpose rather than the end finally aimed at.

The requirement of small annual fees is not decisive. That has been held in our former decisions. *Gooch v. Association for Relief of Aged Indigent Females*, 109 Mass. 558. *Franklin Square House v. Boston*, 188 Mass. 409, 410. *Thornton v. Franklin Square House*, 200 Mass. 465. *New England Sanitarium v. Stoneham*, 205 Mass. 335, 342.

There is nothing in *Chapin v. Holyoke Young Men's Christian Association*, 165 Mass. 280, inconsistent with our conclusions. That decision was made, as always must be the case, upon the facts that had been proved. Whether the defendant in that case could have shown the same facts that appear in this case cannot now be known. But it is worth noticing that in that case the defense set up would have failed in any event, as is shown by the cases there cited.

That this fund was in the possession of trustees is not a material circumstance. *Watson v. Boston*, 209 Mass. 18.

Under somewhat similar facts, a decision like ours has been made in other States. *Commonwealth v. Young Men's Christian Association*, 116 Ky. 711. *Philadelphia v. Women's Christian Association*, 125 Penn. St. 572.

There was no error in the refusal to rule that the defendant was entitled to judgment.

Exceptions overruled.

BENJAMIN C. FRIEDMAN vs. JUNIUS PIERCE.

235-382
235-583

Suffolk. November 13, 1911. — January 2, 1912.

Present: RUGG, C. J., HAMMOND, SHELDON, & DECOURCY, JJ.

Evidence, Extrinsic affecting writings, To show fraud, Presumptions and burden of proof.
Contract, In writing, Performance and breach. *Fraud. Practice, Civil*, Ordering verdict. *Damages*, In contract.

Where one signs an unequivocal agreement in the form of a letter to pay for a stated number of volumes of an existing publication to be shipped by the person to whom the letter is addressed, and the letter contains the words, "This agreement is unconditional, except as noted hereon," and no conditions are noted thereon, the signer of the letter cannot show, at the trial of an action upon the agreement brought after he had received the books therein described and had returned them because he did "not feel as if" he could "afford the expense," that he was induced to sign the agreement by a representation of an agent of the vendor that, if he would sign, the books would be shipped to him with the privilege of examination and that he would be allowed to return them after examination if they were not satisfactory, such evidence tending to vary the terms of an unequivocal agreement in writing and not being sufficient to sustain a defense that the agreement was procured by fraud.

At the trial of an action upon an agreement in writing, dated on a May 12, whereby the defendant had agreed to receive and pay for certain volumes of a published work and the plaintiff had agreed to send him the volumes, it appeared that the following was printed on the face of the contract after the signatures, "1 year's subscription Scientific American Free," that the volumes were sent to the defendant about May 25 and that he returned them at once with a letter stating that he could not afford the expense of purchasing them. The only evidence with regard to the "Scientific American" was testimony of the defendant, "that he received some copies of the Scientific American, — how many he could not say, — that he received copies until he wrote to the Scientific American Company" the letter of May 25. There was no evidence describing the "Scientific American." A verdict was ordered for the plaintiff. *Held*, that a verdict should not have been ordered for the plaintiff, it being incumbent upon the plaintiff to prove that he had complied with all the terms of his contract and there being evidence from which the jury might have found that the "Scientific American" was not sent to the defendant after May 25.

Where, at the trial of an action upon a written agreement by the defendant to receive and pay for certain volumes, a year's subscription to the "Scientific American" to be given to the defendant free, there is evidence from which the jury may find that, although the volumes were sent to the defendant, the "Scientific American" was sent to him only for two weeks, and that, upon his returning the volumes, the vendor kept them for nearly three months without notifying the defendant that acceptance of them was refused and that they were held subject to his order, and that the full contract price was not claimed from the defendant for eleven months after the volumes were delivered to him, a verdict should not be ordered for the plaintiff for the full contract price.

CONTRACT by the assignee of the vendor of sixteen volumes of "The Americana," sent to the defendant in accordance with the order given below. Writ dated July 30, 1910.

In the Superior Court the case was tried before *Sanderson, J.* It appeared that the defendant signed for the plaintiff's assignor the following order, paying \$7 to its representative at the time.

"May 12, 1909.

"Scientific American, Compiling Dept.,
225 Fifth Avenue, New York.

"Gentlemen: Please ship to me, charges paid, one complete set of The Americana, in sixteen (16) volumes, bound in your Three-quarter Persian Morocco, for which, as value received, I agree to pay you, or your order, at the rate of \$7 per volume, payable seven dollars monthly.

"(Signed) Junius Pierce.

Received \$7 as cash payment.

F. L. Corrigan, Representative.

This agreement is unconditional, except as noted hereon.

1 year's subscription

Title to remain in

Scientific American Free.

you until all payments
are made."

The contract was assigned to the plaintiff for the purpose only of bringing this action.

There was evidence tending to show that the books were delivered to the defendant; that on May 25, 1909, he returned the books by express and wrote to the plaintiff's assignor: "I am very sorry that I cannot see my way clear to accept these books as they are a valuable acquisition, but at present I do not feel as if I can afford the expense. I trust the seven dollars paid will cover the express, and if it does not kindly notify me and I will remit the difference."

The defendant testified "that he received some copies of the Scientific American,—how many he could not say,—that he received copies until he wrote to the Scientific American Company the letter" of May 25.

There was no evidence describing the "Scientific American."

The defendant offered in evidence an alleged conversation between himself and the agent who solicited from him the signing

of the foregoing order, and in connection therewith offered to prove the following facts:

"The agent of the plaintiff's assignor approached the defendant for the purpose of selling him a certain encyclopedia. The defendant said that he already had the Encyclopedia Britannica. The agent said that the encyclopedia which he offered for sale was different from the Encyclopedia Britannica, and would be of value to a man who owned the Encyclopedia Britannica. The agent had, at the time, only a cover and a few leaves of his book as a sample. The defendant stated that he would not subscribe for the book. The agent then said, 'If you will sign this contract, the books will be sent to you with the privilege of examination and you will be allowed to return them after examination if they are not satisfactory.' The defendant signed the order relying upon this statement, and would not have signed it but for this statement of the agent. When the books were delivered, he examined them and within twenty-four hours returned them. The plaintiff's assignor never notified the defendant that they refused to receive the books or that they held them subject to his order, except as that fact may be inferred from the three following letters to the defendant: The first letter was dated August 5, 1909, and read, "Referring again to contract we hold as signed by you, relating to the purchase of the 'Americana,' and which agreement you desire to have cancelled, we must request that you kindly give this matter further consideration, as we still adhere to the opinion that you should meet the obligation, and considering the small monthly payments required, we hold that you should be perfectly able to discharge the same. While we do not wish to be arbitrary, still we must protect our interests, and unless we can adjust the account with you direct we shall have to take other measures to secure our rights. We can assure you that we do not intend this as an ordinary threat, for we are confident that with some slight sacrifice you could meet the obligation and that the goods sold you are equal to representation and fully worth the value charged." The second letter was dated November 16, 1909, and read, "We wish to call your attention to your written contract with us in re 'Americana.' You obligated yourself under this contract to pay a certain amount for goods, as called for therein, and the books were duly delivered,

but subsequently returned by you with statement that you did not feel able to pay for same. This certainly does not warrant us in cancelling the agreement and we shall surely hold you responsible. It is not our desire to cause any one unnecessary trouble. We are held to our own agreements, and from a business standpoint there seems to be no substantial excuse for your failure to carry out your part and we will be obliged to take this matter up in some other way if you are still unwilling to deal with us direct and persist in your refusal to adhere to the terms of the obligation." The third letter was dated April 25, 1910, and read, "We have carefully considered the reasons alleged as to your refusal to fulfil the contract you entered into with us. Acting under the advice of our attorney . . . we hereby advise that unless you arrange for a satisfactory settlement on or before the 10th of May, suit will be entered at once for the full amount as per original contract, and no further notice can be expected from this office. . . . We do not wish to start proceedings before giving you formal notice and an opportunity to settle with us direct. . . ."

The presiding judge ruled that the evidence offered tended to vary the written contract and was not admissible to prove fraud, and excluded it, subject to an exception by the defendant.

The defendant then asked the presiding judge to rule that upon the evidence and the facts above stated the plaintiff could recover, not the amount due under the contract, but damages for breach of the contract, to be assessed by the jury. The presiding judge ruled that the plaintiff was entitled to recover the full amount due under the contract at the date of the writ, with interest from that day, and ordered the jury to find for the plaintiff accordingly; and the jury accordingly found for the plaintiff in the sum of \$92.64. The defendant alleged exceptions, and counsel agreed that if either of the above rulings was erroneous, judgment was to be entered for the defendant.

C. S. Tilden, for the defendant.

W. P. Murray, for the plaintiff.

DECOUROY, J. The conversation between the book agent and the defendant, before the signing of the order, was rightly excluded. It was an attempt to vary the effect of a written contract which contained an express stipulation that it was un-

conditional; *Faucett v. Currier*, 109 Mass. 79; *Mears v. Smith*, 199 Mass. 319; and the excluded evidence was insufficient to sustain the defense of fraud. *Knowlton v. Keenan*, 146 Mass. 86. *American Soda Fountain Co. v. Spring Water Carbonating Co.* 207 Mass. 488.

But we are of opinion that the court should have submitted the case to the jury, instead of directing a verdict for the plaintiff for the full amount due under the contract at the date of the writ. On the issue of liability it was incumbent upon the plaintiff to prove that his assignor had complied with all the terms of its contract, which included an agreement to send to the defendant a copy of the *Scientific American* for one year. There was evidence from which the jury could find that the vendor did not send the paper after May 25, 1909, and that it thereby failed to perform the contract on its part.

The issue of damages also should have been submitted to the jury. The vendor's failure to forward the paper after the defendant had returned the books tended to support the defendant's claim that the return of the books had been accepted, and that the vendor thereby lost its right to recover the entire contract price. So far as the record shows it retained the books from May 25, 1909, to August 5, 1909, without notifying the defendant that the acceptance of the books was refused, or that they were held subject to his order. And the jury might have deemed it significant on this question that the letter of April 25, 1910, was the first to claim, in terms at least, the full contract price. *Barrie v. Quinby*, 206 Mass. 259. Without further considering the evidence it is apparent that the ruling was erroneous.

Under the agreement of counsel the entry must be

Judgment for the defendant.

214-100
247-455
JAMES F. MORRISSEY, administrator, vs. BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. November 14, 1911. — January 2, 1912.

Present: RUGG, C. J., HAMMOND, SHELDON, & DECOURCY, JJ.

Negligence, Street railway.

In an action against a street railway corporation for personal injuries from being run into by a car of the defendant when the plaintiff was driving a pair of horses attached to a covered express wagon, there was evidence on which it could have been found that the plaintiff was driving on a city street with the right hand wheels of his wagon close to the curbstone on the right hand side of the street, where the nearest rail of the defendant's tracks was twelve feet distant from the curbstone, and that he was approaching an intersecting street at the corner of which a curved track of the defendant came within three feet of the curbstone, that on the track by the side of which the plaintiff was driving the defendant's cars were running as often as once a minute, more than one half of them proceeding straight ahead in the direction in which the plaintiff was going, and the others turning by a switch around the curve into the intersecting street, that a short distance behind the plaintiff a car was approaching on the straight track, that the motorman was driving it slowly on account of the congested traffic, that the plaintiff's wagon was in plain sight and apparently about to cross the intersecting street, when the defendant's motorman, without ringing any warning gong, entered upon the curved track which crossed the plaintiff's path and ran the car into the wagon behind its forward left wheel, causing the injuries sued for. There was no direct evidence that the plaintiff listened and no evidence that he looked backward before driving upon the curved track, but according to some of the evidence, even if he had looked backward when the horses reached the curved track, he then would have seen the car upon the straight track and apparently proceeding to cross the intersecting street instead of turning the corner. *Held*, that there was evidence for the jury of due care on the part of the plaintiff and of negligence on the part of the defendant.

DECOURCY, J. This action was brought by William E. Morrissey to recover for personal injuries; and he is hereinafter referred to as the plaintiff although the action is now being prosecuted by his administrator. The collision complained of occurred between six and seven o'clock, in the evening of January 31, 1908, at the corner of Dorchester Avenue and West Fourth Street in South Boston. The defendant company maintained double tracks on both streets. At the time of the accident cars were running southerly on Dorchester Avenue

as often as once a minute, more than one half of them proceeding straight down the avenue and the others turning into West Fourth Street by means of a switch and curved track. On the avenue the nearest westerly rail was twelve feet from the curbstone, and the curved rail, in turning the corner into West Fourth Street, approached to within three feet of the curb.

The plaintiff was driving a two horse, covered express wagon and was going southerly along Dorchester Avenue, with his right hand wheels close to the curb of the westerly sidewalk, when the collision occurred.

The trial judge* directed a verdict for the defendant. The question before us is whether, upon the view of the testimony most favorable to the plaintiff, there was evidence of his due care and of the motorman's negligence proper for the consideration of the jury. *Sellon v. Boston Elevated Railway*, 208 Mass. 507.

There was evidence on which the jury would have been warranted in finding that the motorman was driving his car slowly on account of the congested traffic; that the plaintiff's team was proceeding in the same direction, a short distance ahead of the car and in plain sight, and apparently about to cross West Fourth Street; and that the motorman, without ringing any warning gong, entered upon the curved track which crossed the plaintiff's path and ran the car into the wagon behind the forward left wheel. This made the question of the defendant's negligence one of fact for the jury, notwithstanding that the witnesses called by it testified that the wagon ran into the car.

Although the case is closer on the issue of the plaintiff's due care, this question also was for the jury on the testimony of his witnesses. Upon their story we have virtually a rear end collision, with no warning signal of the car's approach. *Kerr v. Boston Elevated Railway*, 188 Mass. 484. *Callahan v. Boston Elevated Railway*, 205 Mass. 422. There is no direct evidence that the plaintiff listened, but he might well assume that the motorman would sound the gong before changing the course of the car and attempting to cross the path of the team. And if any duty to look devolved upon the plaintiff

* *Morton, J.*

under the circumstances, the jury might consider that his look should be forward toward the intersecting street which he was approaching. According to some of the evidence, even if he had looked backward when the horses reached the curved track, he would have seen the car on the straight track and apparently proceeding as if to cross West Fourth Street. And on the plaintiff's version of the accident the collision would not have occurred if the car had remained on the straight track.

Exceptions sustained.

A. T. Smith, for the plaintiff.

E. P. Saltonstall, for the defendant.

PALATINE INSURANCE COMPANY OF LONDON, Limited, vs.
ANNIE KEHOE.

Suffolk. November 14, 1911. — January 2, 1912.

Present: RUGG, C. J., HAMMOND, SHELDON, & DECOURCY, JJ.

Practice, Civil, Exceptions. Deceit. Evidence, Competency, Admissions and confessions. Witness, Impeachment.

An exception to a refusal of a presiding judge to rule at the close of a trial, that on all the evidence the plaintiff could not recover, cannot be sustained upon a bill of exceptions which does not purport to state all the material evidence.

An insurance company may maintain an action for deceit to recover the amount paid by the plaintiff to the defendant on an alleged loss of property by fire under a policy issued by the plaintiff, on showing that the plaintiff was induced to make the payment by misrepresentations of material facts concerning the property alleged to have been destroyed by fire knowingly made by the defendant in the proof of loss signed and sworn to by him, intending that they should be acted upon by the plaintiff.

In an action for deceit brought by an insurance company, to recover the amount paid by the plaintiff to the defendant on an alleged loss of household furniture by fire under a policy issued by the plaintiff, where there was evidence that the plaintiff was induced to make such payment by false representations knowingly made by the defendant that the property when destroyed by fire was in a building covered by the policy, the defendant excepted to the admission in evidence of a "rider" giving the defendant permission to remove the insured property to a certain house in another town. It appeared that such permission to remove the property at first was given orally, that the rider was prepared by the plaintiff and was made a part of the daily report in its books showing the status of the

policy, that the rider was not attached to the policy because the policy was not presented when the permission was given orally and afterwards was destroyed by fire, but that the rider was attached to the proof of loss which the defendant signed and swore to and presented to the plaintiff a few days after the fire. The judge in his charge gave instructions to the jury, under which they might find that the defendant adopted the rider as a statement of the terms on which a removal had been permitted orally, and limited the use of the rider to this purpose. *Held*, that the charge was sufficiently favorable to the defendant, and that the defendant was not aggrieved by the admission of the evidence.

In an action for deceit brought by an insurance company to recover the amount paid by the plaintiff to the defendant on an alleged loss of household furniture by fire under a policy issued by the plaintiff, where there was evidence that the plaintiff was induced to make such payment by false representations knowingly made by the defendant that the property when destroyed by fire was in a building covered by the policy, the defendant and the defendant's husband both testified as witnesses. For the purpose of impeaching their credit as witnesses by contradicting their testimony, the plaintiff was permitted to put in evidence the statements made by the defendant and her husband to a deputy chief of the district police upon an official inquiry instituted by him to investigate the fire and the matters relating thereto. *Held*, that the evidence was competent for the purpose for which it was admitted, it being said, that the statements of the defendant also were competent as admissions.

TORT for deceit, to recover the sum of \$844.90 paid to the defendant on a loss of household furniture and other articles of personal property under a policy which was issued by the plaintiff when the property described in it was in a frame apartment house with stores underneath it, on Ocean Avenue in Revere, known as the Irving Cottage. Writ in the Municipal Court of the City of Boston dated September 19, 1905.

On appeal to the Superior Court the case first was tried before *Hitchcock, J.* The jury returned a verdict for the defendant, and exceptions alleged by the plaintiff were sustained in a decision reported in 197 Mass. 354.

There was a new trial of the case before *Sanderson, J.*, at which the jury returned a verdict for the plaintiff for the whole amount claimed; and the defendant alleged exceptions, raising the questions which are stated in the opinion.

The following facts appeared in the bill of exceptions: The fire was in the Irving Cottage at Revere. The defendant had bought a house at Randolph and was arranging to move from her tenement in the Irving Cottage. From this tenement the defendant's husband had carried to Randolph a one horse load of furniture and bedding, which he had placed in the barn at Randolph, because the occupant there had not removed from the

house. A few days before the fire the defendant's husband "had started to move the piano and some furniture, but had not been able to depart in time so had taken the piano and other articles which had been brought down from the tenement into the Nickel Palace," a building separated from the Irving Cottage by a passageway a few feet wide. The Nickel Palace, which formerly had been used as a theatre, belonged to the defendant, and the plaintiff had refused to insure it. In the proof of loss, signed and sworn to by the defendant, the insured property was stated to have been destroyed or injured by fire in "the building insured." On June 4, 1905, the Irving Cottage and also the Nickel Palace with their contents were totally destroyed by fire.

The "rider" referred to in the opinion was as follows: "Permission is hereby given the assured to remove the within insured property to frame dwelling building situated e/s/ South Main Street, between Union and Maple Streets, Randolph, Mass. This policy to attach and cover the same in both locations during removal in proportion as the value in each location shall bear to the value in both and after removal shall attach and cover in new location only."

The statements of the defendant and her husband, which are referred to in the opinion, were made to a deputy chief of the district police in charge of the detectives and fire inspectors, upon an official inquiry instituted by him to investigate the fire and the matters relating thereto. The statements were testified to by the stenographer who took them down at the inquiry. The judge, in admitting the testimony against the defendant's objection, said that it was "admitted solely for its tendency, if it has any, to contradict the witnesses who have testified."

The case was submitted on briefs.

H. Dunham, for the defendant.

R. D. Ware, for the plaintiff.

DECOURCY, J. This is an action of tort for deceit, to recover back the sum of \$844.90 paid to the defendant on a loss of personal property under a policy issued by the plaintiff. There was a verdict for the plaintiff and the case is here on certain exceptions taken by the defendant.

1. The defendant requested the judge to rule that upon all the evidence the plaintiff could not recover, and excepted to the

refusal of the judge so to rule. This exception might well be overruled on the ground that the record before us does not purport to contain all the evidence. But, even on the facts set forth in the bill of exceptions, there was evidence tending to show that the defendant, in the proof of loss signed and sworn to by her, knowingly misrepresented material facts concerning the property claimed to have been destroyed by fire, with intent to have the company act thereon; and that the plaintiff was thereby deceived and induced to pay her the money in question.

2. Exception was taken to the admission in evidence of the "rider" dated May 29, 1905, giving permission to the assured to remove the insured property to Randolph, and also to the judge's charge in reference thereto. When the case was before this court in 1908 it was agreed that this rider was attached to the policy. *Palatine Ins. Co. v. Kehoe*, 197 Mass. 354. It now appears that an oral permit to remove the property was given first, that the rider was prepared by the plaintiff and made a part of the daily report in its books showing the status of the policy, and that it was not attached to the insurance policy because the policy was not presented when the permit was orally given and was destroyed by the fire on June 4, 1905. The only reason urged by the defendant against the admissibility of the rider is that it was not shown to the defendant before the fire. But it was attached to the proof of loss which she signed and swore to on June 9, 1905, a few days after the fire; and the jury might well find that she thereby adopted this printed form as a statement of the terms upon which the removal had been orally permitted. In fact the judge's charge limited the use of the rider to this purpose. The charge was sufficiently favorable to the defendant, and she was not aggrieved by the admission of the evidence.

3. The statements of the defendant and her husband made to the district police officer were admissible to contradict their testimony as witnesses; and those of the defendant were also competent as admissions.

Exceptions overruled.

J. GEORGE CURRY vs. MORRIS DORR & others.

Suffolk. November 15, 1911. — January 2, 1912.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DECOURCY, JJ.

Trust. Frauds, Statute of. Nuisance. Negligence, Of one owning or controlling real estate.

In an action for personal injuries alleged to have been sustained by reason of a defective condition of the defendant's land at its junction with a public sidewalk, where it appears that at the time of the accident the land in question was held by a person other than the defendant under a deed absolute on its face, under R. L. c. 147, § 1, the plaintiff cannot show by oral evidence that the defendant formerly owned the land and conveyed it with an understanding of the parties to the conveyance that the defendant should retain the beneficial interest in the land and should receive the rents and profits; but, if the plaintiff could prove such a beneficial interest in the defendant, that would not make the defendant liable for injuries caused by the alleged defect without showing that the defendant was in occupation of the land or had undertaken its management and control.

TORT, against Morris Dorr, Frank B. McQuesten and Edward A. Bangs, for personal injuries alleged to have been sustained by the plaintiff on November 8, 1903, from tripping over a step or ridge in the pavement on land at the corner of Huntington Avenue and Gainsborough Street in Boston at a point where the land alleged to belong to the defendants adjoined the public sidewalk of Gainsborough Street. Writ dated January 12, 1904.

In the Superior Court the case was tried in May, 1906, before Wait, J. There was evidence from which a jury could find that the plaintiff was in the exercise of due care and that the premises alleged to belong to the defendants were in a defective condition. During the trial the plaintiff discontinued against the defendant McQuesten, and at the close of the evidence the judge ordered a verdict for the defendant Dorr.

The plaintiff was about to call the defendant Bangs as a witness for the purpose of showing his ownership of the premises, when that defendant's counsel objected to the defendant Bangs being asked whether he owned the property on the ground that the paper title was in one Barlow, and that Barlow owned it at

that time, and oral evidence was not admissible to show that the title was in somebody else. It being admitted that the paper title was in Barlow, the counsel for the defendant Bangs made the following statement: "The paper title shows a conveyance from the defendant Bangs, Edward A. Bangs, to Morris Dorr by quitclaim deed dated November 10, 1902, recorded November 10, 1902, and a conveyance from said Morris Dorr to Robert S. Barlow by quitclaim deed dated July 1, 1903, and recorded August 17, 1903, there being no change in the title subsequent to that date and before the date of the accident. The plaintiff's attorney would show by this witness, Bangs, if he were allowed to testify, that the property was held by the said Barlow for him, he having the rents and profits of the estate, the said Barlow and the said Dorr having no beneficial interest in the property."

Thereupon the judge said, "I rule that the witness may answer, and save the exception of the defendants Dorr and Bangs." There was no evidence tending to show the defendant Bangs's title to the property or his interest therein except as above set forth.

The defendant Bangs asked the judge to rule as follows:

"That upon all the evidence the plaintiff is not entitled to recover.

"That upon all the evidence the jury would not be warranted in finding negligence upon the part of the defendant Bangs."

The judge refused to rule as requested and submitted the case to the jury, who returned a verdict for the plaintiff in the sum of \$2,575. The defendant Bangs alleged exceptions, which were allowed by *Wait*, J., on September 20, 1911.

W. H. Hitchcock, for the defendant Bangs.

W. M. Hurd, for the plaintiff.

BRALEY, J. By the plaintiff's discontinuance against McQuesten, and the verdict ordered for Dorr, the defendant Bangs remained as the only adversary party, and unless some competent evidence was introduced connecting him with the responsible ownership or efficient control of the premises, the defective condition of which was alleged as the cause of the accident, the action cannot be maintained. *Baker v. Tibbetts*, 162 Mass. 468, 469. *Maloney v. Hayes*, 206 Mass. 1.

The record title at that time having stood in the name of one Barlow under a conveyance in fee, absolute upon its face, with no proof that the consideration had been furnished by the defendant, parol evidence, that the parties understood, that Bangs should retain the beneficial interest, and receive the rents and profits, was incompetent under our statute relating to the creation of trusts in land, and should have been excluded. R. L. c. 147, § 1. *Blodgett v. Hildreth*, 108 Mass. 484. *Urann v. Coates*, 109 Mass. 581, 585. *Twomey v. Crowley*, 137 Mass. 184.

But, even if given the probative force for which the plaintiff contends, the defendant's equitable interest was insufficient to support the verdict. The defendant is not shown to have been in occupation, or to have undertaken the management and control of the property as if it were his own, and the legal title having been in the trustee he alone would be liable personally for the plaintiff's injuries. *Earle v. Hall*, 2 Met. 853, 858, 860. *Shepard v. Creamer*, 160 Mass. 496. *Baker v. Tibbetts*, 162 Mass. 468, 469, 470. *Falardeau v. Boston Art Students' Association*, 182 Mass. 405. The rulings requested having directed the attention of the judge to this initial difficulty, which the plaintiff had not overcome, a verdict for the defendant should have been ordered.

Exceptions sustained.

CLARA E. WEBBER vs. OLD COLONY STREET RAILWAY
COMPANY.

GEORGE M. WEBBER vs. SAME.

Plymouth. November 16, 1911. — January 2, 1912.

Present: RUGG, C. J., HAMMOND, BRALEY, & SHELDON, JJ.

Negligence, Street railway, *Res ipsa loquitur*. *Practice*, Civil, Findings of trial judge, Presumptions and burden of proof, Exceptions. *Damages*, In tort.

At a trial before a judge, without a jury, of an action by a woman against a street railway corporation for personal injuries sustained when the plaintiff was a passenger on a car of the defendant, where there is evidence that the plaintiff's injuries were occasioned by a jolt which caused one side of the forward part of

the car to rise and lifted the plaintiff some inches from her seat so that she fell back with a hard thump, if the judge finds, on evidence warranting such findings, that the jolt was not due to a defective condition of the car or to any defect in the roadbed or track or to any negligence in the operation of the car, these findings of fact, depending on the weight of testimony and the credibility of witnesses, are not open to review upon exceptions.

At the trial before a judge, without a jury, of an action by a woman against a street railway corporation for personal injuries sustained when the plaintiff was a passenger on a car of the defendant, where it appears that the plaintiff's injuries were occasioned by a jolt which caused one side of the forward part of the car to rise and lifted the plaintiff some inches from her seat so that she fell back with a hard thump, this is not to be regarded as an ordinary incident of travel, and, if unexplained, is evidence of the defendant's negligence, but it does not change the burden of proof which still is upon the plaintiff, and if the judge finds, on evidence warranting such findings, that the jolt was not due to a defective condition of the car or of the roadbed or the rails, but probably was due to a small obstruction upon the surface of one rail, which the forward wheel probably removed or crushed, and that the motorman was not negligent in failing to see this small obstruction which must have been upon a curved portion of the track, a finding of the judge that the plaintiff has not sustained the burden of proof is justified.

In an action of tort by a woman against a street railway corporation for personal injuries alleged to have been caused by a violent and unusual jolt of a car of the defendant in which the plaintiff was a passenger, where there was evidence that the plaintiff was suffering from physical conditions which made her peculiarly susceptible to a particular form of injury from the violent jolting of the car, it was said, that if the plaintiff proved that the unusual jolt was caused by the defendant's negligence and that it was the proximate cause of her injury, it was not necessary for her "to prove that the jolt was such that it would have caused, or was sufficient to cause, actual injury to a passenger in normal health in the same situation."

An exception of a plaintiff in an action of tort to a ruling of the judge before whom the case was tried without a jury, which was an incorrect statement of law unfavorable to the plaintiff, will not be sustained if the findings of fact made by the judge, on evidence warranting such findings, establish conclusively that the defendant was without fault and was not liable to the plaintiff in any event, so that the erroneous ruling became immaterial and the plaintiff was not harmed by it.

TWO ACTIONS OF TORT, the first by a married woman for personal injuries alleged to have been sustained by her while a passenger in an electric car of the defendant in the town of Whitman on May 2, 1907, and the second by the husband of the plaintiff in the first case for expenses incurred by reason of her injuries and for loss of consortium. Writs dated October 28, 1907.

In the Superior Court the cases were tried together before *Schofield, J.*, without a jury.

The evidence showed that the occurrence which resulted in the wife's injury took place on a car of the defendant running

from Whitman to Bridgewater, by the way of East Bridgewater, where the plaintiffs and all of the other passengers called as witnesses lived. The plaintiffs had been to Boston for the afternoon, and were returning home. They travelled from Boston to Whitman on the steam cars, and took the electric street car of the defendant at Whitman at a few minutes after 6 o'clock P. M. They were due at East Bridgewater at about 6.25 o'clock P. M. Nothing unusual occurred until the car was about half a mile out from Whitman village on School Street, so called. At this place the defendant's single track was straight and level except for a slight curve and down grade. The witnesses testified that the jolt afterwards described occurred near or at this curve or bend in the track.

The car was proceeding along at its ordinary rate of speed, according to the testimony of all the witnesses. There were in it five passengers, all of whom were witnesses for the plaintiffs, besides the motorman, who was on the front platform, and the conductor, who was on the rear platform. The car was a closed box car of the old fashioned type, single truck, four wheels, the seats running lengthwise on either side. The seats were upholstered with leather-covered cushions without springs. The plaintiff in the first case, hereinafter called the plaintiff, was seated well forward on the left hand side of the car, about one third of the way back from the front door.

The plaintiff testified as follows: "Well, the car was running along smoothly, at its usual rate of speed, I should imagine. Suddenly there came a most tremendous jouncing. It seemed as if the forward wheel . . . There came this tremendous jounce, . . . I was thrown some inches in the air. . . . It threw me several inches from the seat and I came down with a hard thump. Q. The car, or you or both? A. I should say both."

One McDermott, a passenger, testified that "It was an awful jounce anyway." Other passengers described what happened as a "jar" or "jolt."

The plaintiff's husband, the plaintiff in the second case, when asked to describe what happened, testified as follows: "I couldn't say the exact spot, but near that bend when we were going along, I should say, at perhaps a moderate speed — I don't know just what the speed is there, but it didn't seem any different at

that point from any other point, going along, and the car suddenly gave a jump or a jerk — I don't know just how to explain it. It was an up and down motion. I think that practically covers it." He further testified, "We were going along, and the car was headed toward East Bridgewater, when it gave a kind of an upward jump movement, like that, as if it was going over something, and it seemed as if the forward left wheel went up on to something. Of course, when it came down on to the track I couldn't help but notice a sound, like that [indicating], as if it had been on something and dropped. That is as near as I can explain it."

There was medical testimony in regard to the physical condition of the plaintiff before and after the occurrence and that the "jounce" of the car might have produced a displacement of the uterus from which the plaintiff suffered.

The motorman who was on the car testified that he had no recollection of anything unusual or extraordinary happening on the trip referred to, that he had been over that track twice that same evening before the accident, and that the track at that point was in good condition; that it was more or less grass grown between the rails in places. The conductor on the car testified that he knew both of the plaintiffs by sight; that he first heard of the alleged injury the latter part of August, 1907; that he recollected nothing out of the ordinary on this trip of May second; nothing like what had been described; that he reported nothing; that it would have been his duty to report anything out of the ordinary; that he did not recall the names of any of the passengers on this car, or anything about it.

"There was sufficient evidence from employees of the defendant to justify the finding (if material), that there was no defect in the permanent condition of the roadbed, or of the rails, at the point where the accident occurred."

The foreman of the car barn on this division "testified that he first had his attention called to the condition of the car on which the accident occurred two weeks before the trial; that he then consulted the 'log book' in which is put down the result of the inspections of the different cars; that each car is inspected on the night before it goes out; that the inspection is not done by him personally, but under his directions; that each car is in-

spected by three different men, each of whom inspects a different part of it; that his log-book did not show the names of the inspectors, but he could tell, if he were to look it up, who they were; that if anything was wrong and required repairing, it was the duty of these men to make a verbal report of the same to him; that he would thereupon enter on the log-book the defect and number of the car; that if no defect was reported he simply entered the number of the car; that for May 2, 1907, he had entered only the number of the car. An inspection of each car in use was made every other day."

At the close of all the evidence, the plaintiff in the first case made the following requests for rulings, and the plaintiff in the second case asked that they might be considered as made in his case also, so far as applicable thereto:

"1. On all the evidence, the defendant is liable in damages to the plaintiff.

"2. On all the evidence, if the court is satisfied that the cause of the plaintiff's injury was the jolt or jounce of the car, as testified to by her and her witnesses, the defendant is liable.

"3. A street railway company is liable in damages to a passenger injured while in her seat by an unusual jolt or jounce of the car in which she is riding, in the absence of any explanation by the company of the cause.

"4. Where an accident, such as the one in this case, happens without its appearing affirmatively that the cause was not the result of the defendant's negligence, the defendant is liable.

"5. Where an accident, such as the one in this case, happens without its appearing affirmatively that the defendant's negligence in no way contributed to the cause, the defendant is liable.

"6. A street railway company is liable in damages to a passenger injured while in her seat by an unusual jolt or jounce of the car in which she is riding, in the absence of evidence showing that the same could not have been prevented by the exercise of the highest degree of care on the part of the company consistent with its contract to carry the passenger safely.

"7. If the jolt or jounce described by the plaintiff's witnesses resulted from some cause beyond the defendant's control, it is incumbent upon the defendant to establish this fact by a preponderance of the evidence, in order to avoid liability for the

plaintiff's injury, provided the other elements of her case are made out.

"8. If the injury to the plaintiff was the result of the act of some third party to the contract between her and the defendant, and no negligence on the part of the defendant in any way contributed thereto, it is incumbent upon the defendant to establish these facts by a preponderance of the evidence in order to avoid liability for the plaintiff's injury, provided the other necessary elements of her case are made out.

"9. The duty of a street railway company to a passenger in such a case as the one at bar is the same when the car is travelling along a country road as when it is travelling through a city street; in the case at bar, if the highest degree of care consistent with the nature of its contract to carry the plaintiff safely would have kept the rail clear of obstacles and it was not kept clear, the defendant is liable.

"10. To escape liability for such an accident as the one in this case, the defendant must show that it could not have been prevented by the highest degree of care consistent with the nature of its contract with the plaintiff; and the defendant does this only by excluding by affirmative evidence all the ways in which the accident might have happened as a result of its own negligence.

"11. The defendant is none the less liable if the plaintiff was in a physical condition which made her more susceptible than most other women would have been to such an injury as that which she sustained in this case. The sole question on this branch of the case is, — was the jounce the proximate cause of the injury?

"12. If no displacement of the uterus of the plaintiff has been shown to exist prior to the accident of May 2, 1907, and the jounce or jolt then experienced by the plaintiff caused or aggravated a nervous or run-down condition which resulted in a displacement, the defendant is liable, even if the court finds that the jar or jolt did not at once displace the uterus."

The judge filed the following "findings of fact and rulings" in the first case:

"1. On May 2, 1907, while the plaintiff was a passenger on a car of the defendant, in Whitman, a jolt occurred which lifted

the plaintiff from her seat, but did not cause her to fall. The left forward wheel of the car rose suddenly and dropped with violence, but the forward motion of the car on the rails was not otherwise interrupted.

"2. The plaintiff at the time of the jolt was sitting in her seat, in the usual manner, on the left hand side, about one third of the distance from the front, in a car with two parallel seats, one on each side of the car, and a passageway between. She felt a momentary faintness and nausea, and as if something had given away internally, but did not notify the conductor or motorman of any injury either then or at any time before leaving the car.

"3. Upon leaving the car at East Bridgewater further symptoms of injury appeared, and the medical testimony in the case shows that the plaintiff was then and is now suffering from a displacement of the womb.

"4. The plaintiff was entirely free from contributory negligence.

"5. Neither the motorman nor the conductor noticed the jolt at the time, and nothing occurred to identify it in their minds, or to call it to their attention as in any respect unusual or followed by unusual results. The case is entirely bare of any evidence to explain the jolt, except as such explanation can be inferred from the description of it by the plaintiff and other passengers, and from the fact that it occurred, according to the testimony of the plaintiff, upon a curve, or just before the car entered upon a curve, in the rails.

"6. The court rules, as a matter of law as between passenger and carrier, that the occurrence of a jolt, with evidence of injury to the passenger as a result, the passenger being at the time in the exercise of due care, is a circumstance for the jury, or for the judge trying the case without a jury, to be considered as evidence from which negligence of the carrier or its servants may or may not be inferred. The jolt does not raise a presumption of negligence as matter of law (*presumptio juris*), but is simply evidence which may or may not be sufficient to support an inference of negligence in any given case.

"7. From the description of the jolt in this case the court believes and finds, as a fact, that it was not due to a defective condition of the car or of the roadbed or of the rails, but was

probably due to a small obstruction upon the surface of the left rail. The forward wheel probably removed or crushed this obstruction, as there is no evidence that the left rear wheel did not pass smoothly over the point on the rail where the front wheel rose suddenly and dropped with violence, causing the jolt.

"8. It is, as matter of law, the duty of the servants of the carrier to use the highest degree of vigilance in regard to the condition of the rails. This duty falls especially upon the motorman, from the position of advantage in which he stands. In this case neither the motorman nor the conductor noticed any obstruction. Can the court properly infer from the jolt in this case that there was negligence in operating the car by reason of the fact that the motorman or conductor had not seen an obstruction on the rail which was the actual cause of the jolt? Manifestly, this is a pure question of fact, depending upon the circumstances of the case. If there had been a rock of a ton weight across the rail, and the car bumped into it, before the motorman saw it, the inference of negligence would be almost unavoidable. In this case the obstruction, whatever it was, could not have been large, and it might have been on the rail but a short time. In view of the high degree of care required of the motorman in keeping an eye upon the rails, the court might feel justified in drawing the inference of negligence if the rail at the place of the jolt was a straight rail. When, however, it is remembered that the rail was not straight at that place, and that the motorman probably could not detect an obstruction there as readily as upon a straight rail, that circumstance, in connection with the description of the jolt and all the evidence, leads the court to the conclusion that negligence in operating the car, for which the carrier is responsible, has not been proved.

"9. One further question should be decided. The plaintiff contends, and introduces medical evidence of good quality to prove, that the displacement of the womb was caused by the jolt. The defendant contends, and introduces medical evidence of good quality, that this condition of the plaintiff was not caused by the jolt. The court rules as matter of law that where a passenger, in an action against the carrier, relies upon a personal injury as the result of a jolt, it is not enough to prove a jolt

from which injury resulted in fact, even though the jolt can be described as unusual or extraordinary, but it is necessary to prove that the jolt was such that it would have caused, or was sufficient to cause, actionable injury to a passenger in normal health in the same situation. In this case the court believes and finds as a fact that the plaintiff at the time of the accident was not in normal health. Some time before she had a breakdown, accompanied by indefinite or ambiguous symptoms, which put her physician on inquiry and search for an organic cause. The court finds as a fact, upon all the evidence, that at the time of and before the accident the plaintiff already had displacement of the womb, or that the organ was in such a condition of predisposition to displacement that the jolt caused an injury to her which it would not have caused to a passenger in normal condition, seated as she was, and subjected to the same jolt. There was, in fact, no substantial injury to the plaintiff except the injury to the uterus.

"10. Upon all the evidence the court finds for the defendant.

"11. The plaintiff's requests for rulings are all refused. Although framed with care, they are based throughout, either expressly or by implication, upon one or both of two propositions which seem to the court to be unsound, viz., first, that a jolt, or an unusual jolt or jounce, with an injury to a passenger, raises a presumption of law that the carrier is negligent, and puts the burden on the carrier to clear himself affirmatively by evidence; secondly, that the carrier is responsible to a passenger for injury resulting from a jolt, without regard to whether the passenger was or was not a person in normal bodily health.

"The rulings above given, and this refusal to grant the rulings requested, seem to the court to be sufficient to protect the plaintiff's rights."

In the second case the judge on the same day filed the following "findings of fact and rulings."

"1. The court finds for the defendant.

"2. The findings of fact and rulings filed and made in the case of Clara E. Webber v. The Old Colony St. Ry. Co., which was tried with this case, may be considered as filed and made in this case, so far as the same are applicable."

In each of the cases the plaintiff alleged exceptions.

The cases were submitted on briefs.

R. W. Nutter & C. C. King, for the plaintiffs.

Asa P. French & J. S. Allen, Jr., for the defendant.

BRALEY, J. The judge before whom these cases were tried without a jury having made certain findings of fact on which he ruled as matter of law, that the plaintiffs could not recover, they seek to have the findings set aside with the exception of those numbered two, three and four, and the rulings reversed.

It may be, as the plaintiffs contend, that by refined yet clear discriminations a substantial cause of action which they believed had been established by the evidence as stated in the first four findings was overthrown. But the adverse conclusion, that upon all the evidence the jolt which caused the forward part of the car during the transit to rise up on one side, lifting Mrs. Webber from her seat, and causing her to fall back with "a hard thump," was not attributable to a defective condition of the car, or of the roadbed and track, or to any negligence in operating the car, not having been unwarranted, cannot be set aside. It is familiar law, that the weight of testimony and the credibility of witnesses are not reviewable on exceptions.

The plaintiffs presented twelve requests for rulings which were refused. It is manifest that the first two were properly denied, and while the twelfth relating to the measure of damages became immaterial under the eighth finding that no liability of the defendant had been proved, the remaining requests, except the eleventh, directed the attention of the judge to the rule, that the plaintiffs' evidence, which the findings show the judge believed, was sufficient proof of its liability. If the defendant had offered no evidence the requests would have been applicable, but evidently upon the testimony of its motorman and conductor, as stated in the fifth finding, the judge reached the conclusion as to the cause of the accident, which is set forth in the seventh finding. The determination of facts is, however, interwoven in the seventh and eighth findings with the important ruling found in the sixth to which the plaintiffs excepted. The ruling if it rested only on the first four findings might be subject to the plaintiffs' criticism, that it went beyond the evidence. A jolt even if the car is not derailed, but which was sufficient to cause a passenger to pass through Mrs. Webber's experience is not an

ordinary incident of travel. *Work v. Boston Elevated Railway*, 207 Mass. 447. *Nolan v. Newton Street Railway*, 206 Mass. 384, 388. And its unexplained occurrence is presumptive proof of the carrier's negligence. *Egan v. Old Colony Street Railway*, 195 Mass. 159, 161. But where as in the case at bar the defendant introduces evidence not perhaps to account for the accident, but to show that it had not been negligent, the plaintiffs still had the burden of proof, which the judge finally decided had not been sustained. *Carroll v. Boston Elevated Railway*, 200 Mass. 527, 584-586, and cases cited.

The ruling made in the ninth paragraph, that "as matter of law . . . where a passenger, in an action against the carrier, relies upon a personal injury as the result of a jolt, it is not enough to prove a jolt from which injury resulted in fact, even though the jolt can be described as unusual or extraordinary, but it is necessary to prove that the jolt was such that it would have caused, or was sufficient to cause, actionable injury to a passenger in normal health in the same situation" was incorrect, and the plaintiffs' eleventh request in substance should have been given. The defendant was bound to exercise due care in the transportation of those who had been accepted as passengers, and if she was found to have been suffering from physical conditions making her more susceptible to the particular form of injury, shown by the evidence, this fact did not deprive her of all damages caused by the fall. *Coleman v. New York & New Haven Railroad*, 106 Mass. 160. *Derry v. Flitner*, 118 Mass. 181. *Turner v. Boston & Maine Railroad*, 158 Mass. 261, 266. *Spade v. Lynn & Boston Railroad*, 172 Mass. 488, 491. *Sullivan v. Marin*, 175 Mass. 422. *Steverman v. Boston Elevated Railway*, 205 Mass. 508, 518. *Stynes v. Boston Elevated Railway*, 206 Mass. 75. *Pearson v. Duane*, 4 Wall. 605. *Hannibal Railroad v. Swift*, 12 Wall. 262. 13 Cyc. 81, and cases cited in n. 78. See also *Connors v. Cunard Steamship Co.* 204 Mass. 310.

But the plaintiffs were not harmed by this ruling as the previous findings and rulings were decisive of their right to recover. *American Malting Co. v. Souther Brewing Co.* 194 Mass. 89, 97.

Exceptions overruled.

COMMONWEALTH vs. BERT O. TAYLOR.

251-372

Suffolk. November 20, 1911. — January 2, 1912.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DeCOURCY, JJ.

Breaking and Entering. Larceny. Evidence, Circumstantial.

At the trial of an indictment under R. L. c. 208, § 18, for breaking and entering a dwelling house with intent to steal and the larceny therein of three automobile tires, where there is no direct evidence connecting the defendant with the crime charged, if there is evidence that before the discovery of the larceny the defendant was at the owner's house ostensibly as a plumber to remedy a leak in the pipes of a radiator, that afterwards the tires, which were kept in a closed store-room, were missing, and that, within a period of about two weeks thereafter, the defendant had the tires in his possession, sold them under a fictitious name and received the proceeds less a commission of a person whom he employed to effect the sale, and if the defendant offers no evidence to explain or control the facts thus testified to, although it appears that at the time of his arrest he made a statement to a police officer denying the theft and his employment of the person who effected the sale, the facts presented are sufficient, in the absence of any explanation, to sustain the burden of proof which rests on the Commonwealth and to warrant a verdict of guilty.

In order to prove by evidence wholly circumstantial that the crime charged in an indictment was committed by the defendant, it is not necessary to show that the defendant's opportunity to commit the crime was exclusive, where the circumstances, although tending to show an opportunity of others, point to the defendant as the actual offender.

BRALEY, J. The defendant having been convicted under R. L. c. 208, § 18, of the crime of breaking and entering a dwelling house with intent to steal, and the larceny therein of three automobile tires, contends that the verdict should be set aside for manifest errors at the trial.

It is elementary, that unless the venue was correctly laid the court was without jurisdiction. *Commonwealth v. Quin*, 5 Gray, 478, 480. But the owner of the tires was a witness, and his evidence, if believed, was sufficient to prove, that the asportation was within the county, and the taking by whomsoever accomplished was felonious. R. L. c. 218, § 47. *Commonwealth v. Friedman*, 188 Mass. 308.

The government introduced no direct evidence connecting the defendant with the offense, and relied wholly upon proof of cir-

cumstances for a conviction. It appeared that, before the discovery of the larceny, the defendant was at the owner's house ostensibly as a plumber to remedy a leak in the pipes of a radiator, and that afterwards the tires, which were kept in a closed storeroom, were missing. Within a period of about two weeks thereafter he was shown not only to have had them in his possession, but to have sold them under a fictitious name and to have received the proceeds less a commission retained by one Bebeau whom he employed to effect the sale. The defendant, while offering no evidence to control this testimony,* had the benefit of his denial of the theft and of his employment of Bebeau as disclosed in the evidence of the police officer to whom he made the statement at the time of his arrest. The burden of proof undoubtedly rested upon the prosecutor, but, under our decisions, the jury were to determine whether the proof offered was sufficient, in the absence of any explanation, to raise a presumption sufficiently satisfactory to convince them of his guilt as charged in the indictment. *Commonwealth v. Millard*, 1 Mass. 6. *Commonwealth v. Montgomery*, 11 Met. 584. *Commonwealth v. Parmenter*, 101 Mass. 211. *Commonwealth v. Bell*, 102 Mass. 168. *Commonwealth v. McGorty*, 114 Mass. 299. *Commonwealth v. Randall*, 119 Mass. 107. *Commonwealth v. Deegan*, 138 Mass. 182. *Commonwealth v. Williams*, 161 Mass. 442. See Wigmore on Evidence, § 2518.

If the larceny had been of goods which might have been easily disposed of, there would have been more force in the defendant's contention that his connection with the property was not sufficiently recent to justify the inference of guilt, but the jury properly could say, that automobile tires ordinarily do not pass from hand to hand in common traffic. *Rex v. Adams*, 8 C. & P. 600. *Rex v. Partridge*, 7 C. & P. 551.

Nor was it necessary to prove that the defendant's opportunity to break in and steal was exclusive. The opportunity to commit a particular crime may be open to all who with knowledge of the chance are disposed to act feloniously, and, while the evidence tended somewhat to show that others might have had access to the storeroom, it also pointed to the defendant as the actual offender.

* The defendant offered no evidence.

The rulings and instructions having been in accordance with well settled principles, the exceptions must be overruled.

So ordered.

J. L. Sheehan, for the defendant.

T. D. Lavelle, Assistant District Attorney, for the Commonwealth, submitted a brief.

COMMONWEALTH vs. PETER DROHAN.

Suffolk. November 20, 1911. — January 2, 1912.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DeCOURCY, JJ. 213-7226
213-6228
215-7210
216-481
257-192

Practice, Criminal, Default, Motion to quash, Bill of particulars, Arrest of judgment, Stay of execution, Complaint. Attempt to commit Larceny. Larceny. Statute, Repeal. Police, District and Municipal Courts.

A motion to remove a default in a criminal case pending in the Superior Court on appeal from a police, district or municipal court is addressed to the discretion of the presiding judge, and a denial of the motion will not be reviewed on appeal to this court.

By suffering a default, a defendant in a criminal case pending in the Superior Court on appeal from a police, district or municipal court waives the benefit of motions, previously filed by him, for particulars and to quash the complaint.

Where a complaint was filed in a police, district or municipal court and, from a sentence there imposed, the defendant has appealed to the Superior Court, it is too late after the case has been entered in the Superior Court to file a motion to quash the complaint for insufficiency in matter of form.

Where a complaint was filed in a police, district or municipal court and, from a sentence there imposed, the defendant has appealed to the Superior Court and has filed therein motions to quash the complaint and for particulars, and upon the calling of the case for trial has defaulted, a motion thereafter filed by him for an arrest of judgment should be denied in accordance with the provisions of R. L. c. 219, § 38, that "no motion in arrest of judgment shall be allowed for a cause existing before verdict, unless it affects the jurisdiction of the court."

Under R. L. c. 8, § 4, cl. 2, providing that "The repeal of an act shall not affect any punishment, penalty or forfeiture incurred before the repeal takes effect, or any suit, prosecution or proceeding pending at the time of the repeal for an offense committed, or for the recovery of a penalty or forfeiture incurred under the act repealed," if at the time of the commission of a certain crime and of the commencement of proceedings in a police, district or municipal court for the punishment thereof, such court has jurisdiction thereof, and before sentence is imposed a statute is passed repealing the statute granting such jurisdiction, a valid sentence nevertheless may be imposed in the proceedings originally begun.

Under R. L. c. 220, § 3, the determination of the question, whether or not the execution of a sentence imposed by the Superior Court upon one convicted of a

crime not punishable by death shall be stayed after an appeal, is discretionary with that court.

Under the provisions of St. 1909, c. 442, giving to police, district and municipal courts jurisdiction of the crime of larceny if the property alleged to have been stolen "is not alleged to exceed the value of three hundred dollars" and empowering them to "impose the same penalties as the Superior Court in like cases, except imprisonment in the State prison," which provisions apply to all larcenies whether simple or aggravated, a complaint in such a court alleging such an offense is not open to the objection that it charges a felony for which there can be conviction only upon an indictment by a grand jury, since the offense charged is not punishable by imprisonment in the State prison.

COMPLAINT, received and sworn to in the Municipal Court of the City of Boston on January 2, 1911, charging the defendant and another with the crime of attempting to commit larceny from the person of an unknown man. The defendant pleaded not guilty, was tried in the municipal court on January 2, 1911, convicted and sentenced. He appealed to the Superior Court, and the complaint was entered in that court on February 6. A motion to quash the complaint and a motion for a bill of particulars were filed by him on February 8. He was called to come into court and prosecute his appeal on September 5, and did not appear but made default. On October 25, 1911, the defendant was brought into court and filed a motion to remove the default, which motion was overruled. He then filed a motion in arrest of judgment, which motion was denied. He was thereupon sentenced to the house of correction and filed a motion to stay the execution of sentence, and this motion was denied.*

P. H. Kelley, for the defendant.

A. C. Webber, Assistant District Attorney, for the Commonwealth, submitted a brief.

DECOUROY, J. [After stating the foregoing facts.] This case comes here upon an appeal from the judgment of the Superior Court, overruling the motion to remove the default, denying the motion in arrest of judgment, and the request for a stay of sentence; and also from the final judgment.

1. The motion to remove the default was addressed to the discretion of the court. *Commonwealth v. Quirk*, 155 Mass. 296. The defendant had a full trial upon the facts in the municipal court and appealed to the Superior Court. He defaulted when his case was duly called for trial and thereby, in effect, admitted

* These motions all were denied by *Sanderson, J.*

every material allegation in the complaint. The case was then ripe for sentence, notwithstanding the pendency of the motion to quash and the motion for particulars, which were not called to the attention of the court. If the defendant desired to be heard upon these questions it was his duty to present them to the court when the case was called for trial. By suffering a default he waived the benefit of the motions. R. L. c. 219, § 27. *Commonwealth v. Whitney*, 108 Mass. 5. *Dalton-Ingersoll Co. v. Fiske*, 175 Mass. 15. *McIntyre v. People*, 38 Ill. 514, 521. We may add that it was too late to file a motion to quash for insufficiency of form after the case reached the Superior Court. *Commonwealth v. Reid*, 175 Mass. 325. And as the complaint sets out the charge "fully, plainly, substantially, and formally," the motion for particulars is without substantial merit.

2. The motion in arrest of judgment was rightly overruled. "No motion in arrest of judgment shall be allowed for a cause existing before verdict, unless it affects the jurisdiction of the court." R. L. c. 219, § 38. *Commonwealth v. Chiovaro*, 129 Mass. 489. This section has been construed to apply where the facts are settled by a default, *Commonwealth v. Swain*, 160 Mass. 354, and disposes of at least the first part of the motion, based upon the pendency of motions filed before the defendant was defaulted. The remaining question raised is whether the right to sentence the defendant was lost by the repeal of R. L. c. 208, § 30, which prescribed the punishment for larceny of property not exceeding \$5 in value. This statute was in force when the crime was alleged to have been committed, but was repealed before the defendant was sentenced in the Superior Court. Even if it were true that R. L. c. 215, § 6, cl. 4, restricted the court to a sentence for an attempt to commit this minimum larceny, the obvious answer to the defendant's contention is, that by the express provisions of R. L. c. 8, § 4, cl. 2,* the repeal of the stat-

* Section 4 of R. L. c. 8, states various rules to be observed in construing statutes "unless their observance would involve a construction inconsistent with the manifest intent of the general court, or repugnant to the context of the same statute." Clause 2, referred to in the opinion, reads: "The repeal of an act shall not affect any punishment, penalty or forfeiture incurred before the repeal takes effect, or any suit, prosecution or proceeding pending at the time of the repeal for an offense committed, or for the recovery of a penalty or forfeiture incurred under the act repealed."

ute did not affect this prosecution, which was then pending. No saving clause in the repealing statute was necessary because under this long established rule of construction the repeal of the act did not affect any punishment incurred before the repeal took effect, or any prosecution pending at the time of the repeal, for an offense committed under the act repealed. R. L. c. 8, § 4, cl. 2.

3. The refusal of the court to stay the execution of the sentence was discretionary. R. L. c. 220, § 8.

The foregoing disposes of all questions raised upon the record, unless the appeal from the final judgment be considered as a basis for the defendant's argument that the municipal court had no jurisdiction of the offense. Under St. 1909, c. 442, the municipal court has jurisdiction of the crime of larceny if the property alleged to have been stolen "is not alleged to exceed the value of three hundred dollars." The statute includes all larcenies, whether simple or aggravated, and applies to larcenies from the person. *Lewis v. Robbins*, 13 Allen, 552. This jurisdiction is accompanied by a restriction on the authority of the court which prevents it from imposing the penalty of imprisonment in the State prison. Thereby the objection that the offense charged in the complaint is a felony, for which the defendant could be convicted only upon an indictment of a grand jury, is obviated. *Commonwealth v. Gately*, 208 Mass. 598.

As to the further objections based on the absence of an allegation of value in the complaint it is sufficient to say that it is unnecessary to allege value in an indictment for an attempt to commit a larceny from the person, and no such allegation is contained in the form provided as a sufficient one in our statute. *Commonwealth v. McDonald*, 5 Cush. 365. R. L. c. 218, § 67. The orders appealed from and the judgment must be affirmed.

So ordered.

MICHAEL KEAN vs. NEW YORK CENTRAL AND HUDSON RIVER
RAILROAD COMPANY.

Suffolk. November 23, 1911. — January 2, 1912.

Present: HAMMOND, BRALEY, SHELDON, & DECOURCY, JJ.

Contract, Validity. Fraud. Negligence, Railroad. Evidence, Of custom. Witness, Absent witness. Practice, Civil, Conduct of trial: requests and rulings.

At the trial of an action of tort by an employee of a sleeping car company against a railroad company to recover for injuries alleged to have been caused by negligence of the employees of the defendant, a defense relied on was a contract by the plaintiff to hold his employer harmless under a contract it had made with the defendant to hold it harmless and indemnify it for any such liability. The plaintiff, in order to prove that he was procured to sign such an agreement through fraud of an official of his employer, testified that, when he first entered the employ of the sleeping car company, some four years before the injuries complained of, after he had been working two hours, he was called into such official's office, and the paper was passed to him for his signature; that upon his starting to read it the official told him to lay it down, saying, "Sign your name to that. It is an application for work and that is all I have to say about it;" that when he started to read it the official slapped it down on the desk and "told me to sign my name to it and go back to work;" and that the plaintiff thought he "was signing the application under which" he "was going to work." Held, that such evidence entitled the plaintiff to go to the jury as to the question, whether the signature to the document was procured by false representations and concealment of its contents and consequently was not binding on him.

At the trial of an action of tort by an employee of a sleeping car company against a railroad company to recover for injuries alleged to have been caused by negligence of the employees of the defendant in causing an engine with a baggage car attached to it to be bumped violently into a car on the top of which the plaintiff was at work, there was evidence tending to show that at the time of the accident the plaintiff in the course of his duties was on the top of the car bending over with his back in the direction from which the engine was approaching, that it was customary for conductors of shifting crews to give warning to persons working on the tops of cars before an engine was backed against them for the purpose of coupling to and moving them, and that on the occasion in question the plaintiff was not so warned and did not know of the approach of the engine. Held, that the question, whether the plaintiff was in the exercise of due care, was for the jury.

At the trial of an action of tort by an employee of a sleeping car company against a railroad company to recover for personal injuries alleged to have been received by the plaintiff by reason of an engine and baggage car being run violently against a car on the top of which he was working in the course of his duties, evidence is admissible to prove a custom of conductors of the defendant to give warning to men working on the tops of cars of the fact that an engine was about to be attached.

At the trial of an action a witness for the plaintiff was shown in cross-examination a statement in writing, which he admitted bore his signature and which contained a recital of facts at variance with his direct testimony. The witness denied any knowledge of the contents of the statement. The defendant did not call the person who procured the witness's signature to the statement, and in his closing argument to the jury the plaintiff's counsel commented thereon. At the close of the charge the defendant asked the presiding judge to rule that "enough facts do not appear in evidence to warrant the jury in drawing any inference unfavorable to the defendant from the failure to produce as a witness the man who wrote the statement" of the witness. The ruling was refused. *Held*, that the ruling could not properly be made in the terms in which it was asked, because it was for the jury and not for the judge to decide what if any inference should be drawn, and against what party, from the failure to produce the person in question to testify.

TORT for personal injuries received by the plaintiff on March 11, 1905, while in the employ of the Pullman Company and at work upon one of its cars in the Exeter Street yard of the defendant in Boston. Writ dated March 16, 1905.

In the Superior Court the case was tried before *White, J.*

It appeared that in January, 1901, at the time the plaintiff entered the employ of the Pullman Company and also at the time he received the injuries for which the action was brought, a contract was in force between that corporation and the defendant with regard to the furnishing of cars by the Pullman Company to the defendant and the use and operation of them on the defendant's trains, by the tenth section of which the Pullman Company agreed to fully indemnify the defendant against any and all claims that might at any time be made by "employees of the Pullman Company, or of their representatives, on account of death, personal injury or otherwise, howsoever occurring or sustained."

At the time he entered the employ of the Pullman Company, the plaintiff signed a contract entitled, "Contract of Employment," by which he accepted employment by that corporation upon certain "express terms, conditions and agreements," of which there were six, covering one and one half pages of the printed record. Those numbered fourth and fifth were as follows:

"Fourth: I assume all risks of accidents or casualties by railway travel or otherwise, incident to such employment and service, and hereby, for myself, my heirs, executors, administrators or legal representatives, forever release, acquit and discharge The Pullman Company, and its officers and employees, from any and all claims for liability of any nature or character whatsoever, on

account of any personal injury or death to me in such employment of service.

"Fifth: I am aware that said The Pullman Company secures the operation of its cars upon lines of railroad, and hence my opportunity for employment, by means of contracts wherein said The Pullman Company agrees to indemnify the corporations or persons owning or controlling such lines of railroad against liability on their part to the employees of said The Pullman Company in cases provided for in such contracts, and I do hereby ratify all such contracts made or to be made by said The Pullman Company and do agree to protect, indemnify and hold harmless said The Pullman Company with respect to any and all sums of money it may be compelled to pay, or liability it may be subject to, under any such contract, in consequence of any injury or death happening to me, and this agreement may be assigned to any such corporation or person and used in its defense."

The testimony regarding the circumstances under which the plaintiff signed the contract is described in the opinion.

The testimony of Joyce referred to in the opinion was as follows: "Q. On days before this accident, tell us what you observed the conductor do with reference to men on top of the trains before the engine would come down and back on? A. Well, he would come down and notify them, tell them to get off; that he was going to pull the car away." That of Burke was as follows: "During the years that I have been there I always saw the conductor come and notify the men on top of the cars before the coupling was made until that time. What I always saw done was that the conductor of the train came and notified whoever was on top or underneath working, said he was going to pull out the train, going to back the engine on to the train, or going to pull out some or back some."

Both Joyce and Burke, in their cross-examination, were shown statements in writing which they admitted were signed by them and which contained statements more or less contradictory to their direct testimony. Each statement closed with the words, "I have read this and it is all right." Both of them disavowed knowledge of the contents of the statements.

In his closing address to the jury the counsel for the plaintiff argued that inasmuch as Joyce and Burke had each denied that

he "had made the statement to the claim agent who wrote the body of the written statements, signed by them, and had asserted that they had never read the statements notwithstanding that it appeared in their handwriting upon the written instruments 'I have read the above and it is all right;' — that from the defendant's failure to produce the man who wrote the statements the jury ought to infer that if he were produced his testimony would not contradict Joyce and Burke on that point."

At the close of the charge, the defendant asked for the following additional ruling:

"12. Enough facts do not appear in evidence to warrant the jury in drawing any inference unfavorable to the defendant from the failure to produce as a witness the man who wrote the statements of Joyce and Burke."

Other facts are stated in the opinion.

The jury found for the plaintiff in the sum of \$2,000; and the defendant alleged exceptions.

H. F. Knight, for the defendant.

R. H. Sherman, for the plaintiff.

DECOURCY, J. 1. The plaintiff's contract of employment with the Pullman Company enured to the benefit of the defendant; and the agreement to indemnify his employer contained therein constituted a defense to this action unless the plaintiff's signature was obtained fraudulently. This was taken for granted at the trial and the judge so instructed the jury. The evidence in favor of the plaintiff on this issue of fraud was, that after he had worked two hours he was called into the office of Ahearn the general foreman of the Pullman Company and the paper was passed to him for his signature. The plaintiff further testified as follows: "I picked it up to see what it was. 'Oh,' Ahearn says, 'lay it down.' 'Sign your name to that,' he said, 'it is an application for work and that is all I have to say about it.' He said the paper was only an application for work and nothing more. When I started to read it, he slapped it down on the desk, that I was supposed to sign my name to it. He told me to sign my name to it and go back to work. . . . I thought I was signing the application under which I was going to work." This evidence, although contradicted, entitled the plaintiff to go to the jury on his claim that the release was pro-

cured by fraudulent misrepresentations and concealment of its contents and consequently not binding upon him. *Bliss v. New York Central & Hudson River Railroad*, 160 Mass. 447. *Larsson v. Metropolitan Stock Exchange*, 200 Mass. 367.

2. There was evidence of the plaintiff's due care. The jury would be warranted in finding that he had just filled with water the rear tank on the forward car, and that when he was bending over to pull out the hose, an engine with a baggage car attached to it came from behind him and bumped violently against the car on the top of which he was standing; that no bell was rung or other signal given of the approach of the engine; that this train on which he was when injured usually arrived in Boston at half past three in the afternoon, and oftentimes was left standing on this main track over night, before being switched over on another track. There was evidence that it was customary for all conductors of switching crews to investigate whether any men were working on the tops of cars that were about to be moved, and to warn such men to get off, before giving the signal to couple on an engine. The plaintiff testified that before the day of this accident the conductor always notified him to get down when they were about to shift the car upon which he was working, and that no such warning was given at this time. He also testified that the ladder by which he mounted was standing at the forward end of the car, where the conductor presumably could see it. We cannot say, as matter of law, that the plaintiff was careless in not constantly interrupting his work to watch for the approach of an engine, and in relying upon the customary warning. *Meadowcroft v. New York, New Haven, & Hartford Railroad*, 193 Mass. 249. *Hines v. Stanley G. I. Electric Manuf. Co.* 199 Mass. 522.

3. The testimony of Joyce and Burke was rightly admitted. It tended to prove a custom to give warning to men who were working on top of cars, before a shifting engine was attached. *Rafferty v. Nawn*, 182 Mass. 503. *Hines v. Stanley G. I. Electric Manuf. Co.*, *ubi supra*.

4. At the close of the charge the defendant requested the court to give the additional instruction numbered 12. In view of the plaintiff's argument something might well have been said to the jury on the subject of absent witnesses, but the instruction could not properly be given in the terms requested. It was for the jury

and not for the court to decide what if any inference should be drawn, and against which party, from the failure to produce as a witness the man who wrote the statements of the witnesses Joyce and Burke. *Harriman v. Reading & Lowell Street Railway*, 178 Mass. 28.

The foregoing disposes of all the questions raised by the defendant's exceptions and insisted upon in this court.

Exceptions overruled.

MARGARET A. KELLEY vs. BOSTON ELEVATED RAILWAY
COMPANY.

Suffolk. November 28, 1911. — January 2, 1912.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DECOURCY, JJ.

Negligence, Elevated railway, Street railway. Passenger. Evidence, Relevancy and materiality.

One who has arrived, upon a surface street car of a corporation operating both a surface and an elevated railway, at the lower level of a station of two levels maintained by the corporation, and then passes from the lower to the higher level to take a car which is to leave the station there, is a passenger of the corporation and is entitled to have the corporation exercise every reasonable precaution for his transportation in safety and for his protection against unlawful violence of other passengers and of its servants.

At the trial of an action against a corporation operating both a surface and an elevated railway for injuries alleged to have been received by a passenger who had arrived, on a surface street car operated by the defendant, at the lower level of a station of two levels maintained by it, and, having passed to the upper level, was caused to fall into a pit by violence of the crowd as he was attempting to board a car there, testimony, given by superintendents of various divisions of the defendant's system having knowledge of the subject matter, in regard to the arrangements at the station for the transfer of passengers from car to car and from level to level, to the methods necessary to effect such changes, and to the volume of travel and the sufficiency of the mode of service adopted at the station for the protection of passengers, is admissible.

At the trial of an action by a woman against a corporation operating both a surface and an elevated railway for injuries alleged to have been received by the plaintiff, who had arrived, on a surface street car operated by the defendant, at the lower level of a station of two levels maintained by it, and, having passed to the upper level, was caused to fall into a pit by violence of the crowd as she was attempting to board a car there, there was evidence tending to show that, as the plaintiff left the first car and was on her way to the second, she gradually was encompassed by other passengers moving toward the second car until,

as she neared it, she was carried forward by a crowd which was eager to board it, that as she reached the step to the car platform the weight of the mass of people had increased so that she was crowded and whirled to one side into the pit by contact with passengers who themselves could not resist the pressure, that the conductor of the car was absent and no measures were taken by any employee of the defendant then present to protect the plaintiff from the increasing danger to which she was exposed involuntarily, and that the congestion of passengers at that time of day, resulting from their number and eagerness to board cars waiting for them, was not an extraordinary circumstance. *Held*, that the question, whether the plaintiff's injuries were due to negligence of the defendant, was for the jury, who might have found that from the nature of its business the defendant should have foreseen the condition which gave rise to the plaintiff's injury and have provided against that injury by the adoption of reasonable expedients.

TORT for personal injuries received as the plaintiff was attempting to board a surface car of the defendant on the upper level of the defendant's station at Dudley Street in Boston at about 7.08 P. M. on December 5, 1905. Writ dated December 15, 1905.

In the Superior Court the case was tried before *Lawton, J.* It appeared that the plaintiff had arrived on a car from Dorchester on the lower level of the station and had proceeded to the upper level to take a car for Jamaica Plain, and that it was while she was attempting to board the Jamaica Plain car that she received injuries as described in the opinion.

The exceptions of the defendant to testimony of the "defendant's division superintendents," referred to in the second paragraph of the opinion, are stated in the bill of exceptions in substance as being "to all the questions put to the witnesses, Pasho, Tripp and Moore," (superintendent of the defendant's elevated division, superintendent of surface car transportation, and superintendent of surface car division number 1, respectively,) with regard to "whether or not it was a frequent thing for passengers" to run from the elevated trains down over the platform and the steps and the surface car platform in order to gain entrance to waiting surface cars, "and as to whether or not there was any system to prevent people making mad dashes from the elevated trains to the cars, or to prevent people from running," and as to rules and regulations affecting the conduct of employees of the defendant, and as to the number of passengers upon elevated trains that came into the station near 7 P. M., and as to rules posted in the station, and as to what percentage of the

persons who left elevated trains at that station took surface cars, and as to the number of passengers discharged at that station during the day, and as to what percentage of the persons who took surface cars on the upper level came from the street or lower level, and "to all questions along similar lines."

Other facts are stated in the opinion. The jury found for the plaintiff in the sum of \$1,400; and the defendant alleged exceptions.

J. T. Hughes, for the defendant.

E. Greenhood, (*J. R. Larkin* with him,) for the plaintiff.

BRALEY, J. The plaintiff, whose due care is not questioned, having been a passenger when injured, the defendant was bound to take every reasonable precaution for her transportation in safety, and to protect her against the unlawful violence of other passengers, and of its servants. *Jackson v. Old Colony Street Railway*, 206 Mass. 477, 485, 486.

The place of the accident was a terminal station arranged for the arrival and departure of cars over separate tracks located in the upper and lower sections of the building. It was essential to a clear understanding of the difficulties which the plaintiff claimed to have encountered, to explain the arrangements for the transfer of passengers from the cars upon which they arrived to those they must take to continue and complete their journey, and to describe the necessary steps to effect the change. The testimony of the defendant's division superintendents, introduced by the plaintiff, was admissible for this purpose, as well as to show the volume of travel, and the sufficiency of the mode of service adopted for the protection of passengers. *Kuhlen v. Boston & Northern Street Railway*, 198 Mass. 341, 348.

The plaintiff came in on a surface car, and then went to the proper platform to take a car on a different level, and while at the rear platform of the car she fell into the pit below. It is at this point that the conflict in the evidence appears. The jury were not confined to the defendant's theory, that the accident happened through the mere misconduct of a passenger who heedlessly pushed her, and whose act could not have been reasonably anticipated and guarded against, but they had the right to accept the plaintiff's evidence as the true version of the cause of her fall and injury. It is necessary to refer only to the substantial

statements. The plaintiff as she left the first car, and while on her way to the second car, was gradually encompassed by other passengers moving toward it, until, upon reaching the station platform, at the place where she was ready to take the car, she was beset and carried forward by a hurrying crowd eager to get on board. When she reached the step to the car platform the weight of this mass of people had so increased, that she was crowded and whirled over into the pit by contact with passengers who could not themselves resist the pressure. It might have affected the weight of this evidence if the defendant's servants, whose duty it was to prevent passengers from being pushed and crowded or injured, had aided her, but she testified that the conductor was absent, and no measures were taken to protect her from this increasing danger to which she was involuntarily exposed. It is clear from this testimony, that the defendant's request that a verdict should be ordered for it could not be granted. The system of transportation was subject to its control, and in the discharge of its obligations as a carrier the jury could further find upon the evidence, that the congestion of passengers, resulting from their number and eagerness to board cars waiting for them, was not an extraordinary circumstance, but was rather a condition which should have been foreseen from the nature of the business, and provided for by the adoption of reasonable expedients. It follows, that the physical harm suffered by the plaintiff arose through the defendant's negligence in permitting a combination of passengers to press violently upon her, and, while not an assault, the wrong finally inflicted was none the less a violation of its duty, for which compensation in damages can be recovered. *Kuhlen v. Boston & Northern Street Railway*, 193 Mass. 841. *Magee v. New York, New Haven, & Hartford Railroad*, 195 Mass. 111. *Jackson v. Old Colony Street Railway*, 206 Mass. 477. *Glennen v. Boston Elevated Railway*, 207 Mass. 497.

Exceptions overruled.

312-582
249-253

FLORA E. GARLAND vs. BOSTON ELEVATED RAILWAY
COMPANY.

Suffolk. November 24, 1911. — January 2, 1912.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DeCOURCY, JJ.

Negligence, Street railway. Witness, Redirect examination. Practice, Civil, Exceptions.

At the trial of an action by a woman against a street railway company for injuries alleged to have been received by the plaintiff from being thrown to the ground by the sudden starting of a car as she was in the act of alighting, there was evidence tending to show that the car was an open electric car with seats running across it, that in response to a signal from the plaintiff the conductor rang a bell for the car to stop, that while the speed was slackening she passed to the end of the seat upon which she had been sitting, preparatory to alighting, that the car came to a full stop opposite a white post and that, while the plaintiff was in the act of alighting, the car started suddenly and prematurely and she was thrown from it. There was evidence for the defendant tending to show that the plaintiff attempted to alight before the car came to a stop. *Held*, that the questions, whether the plaintiff was exercising due care and whether the employees of the defendant were negligent, were for the jury.

At the trial of an action by a woman against a street railway company for injuries alleged to have been received by the plaintiff from being thrown to the ground by the sudden starting of a car as she was in the act of alighting, there was evidence tending to show that the car was an open electric car with seats running across it, that in response to a signal from the plaintiff the conductor rang a bell for the car to stop, that while the speed was slackening she passed to the end of the seat upon which she had been sitting, preparatory to alighting, that the car came to a full stop opposite a white post and that, while the plaintiff was in the act of alighting the car started suddenly and prematurely and she was thrown from it. The conductor of the car, testifying for the defendant, stated among other things that his attention was called to the plaintiff's fall by screams from other passengers, and he was cross-examined on that subject. In redirect examination the defendant sought to ask him, "You were asked about reasons why persons screamed, as you understood. Why did they scream when she was getting off?" The presiding judge excluded the question and the defendant excepted. Later the defendant asked the witness "Just what was she doing at the moment the screams took place?" and he answered, "She was stepping off the car while it was in motion, stepping off backward." *Held*, that the exception to the exclusion of the first question and answer must be overruled, because its exclusion in redirect examination was within the discretionary power of the presiding judge, and also because from the second question and answer the defendant obtained in another form the evidence he had sought, and therefore was not harmed.

TORT for personal injuries alleged to have been received by the plaintiff while she was a passenger on an open street car of

the defendant and to have been caused by the car starting as she was in the act of alighting from it. Writ dated January 4, 1909.

In the Superior Court the case was tried before *Lawton, J.*

The witness Alexander, referred to in the opinion, was a witness for the defendant. He had been conductor of the car from which the plaintiff alleged that she had been thrown, and in his direct examination had testified to having his attention called to the plaintiff falling by screams of other passengers. He was cross-examined on the subject. In redirect examination the defendant's counsel asked him, "You were asked about reasons why persons screamed, as you understood. Why did they scream when she was getting off?" On objection by the plaintiff, the answer was excluded. He then was asked, "In view of the cross-examination I will call your attention to this — put this question: Just what was she doing at the moment the screams took place?" and answered, "Why, she was stepping off the car while it was in motion, stepping off backward."

Other facts are stated in the opinion. At the close of the evidence, the presiding judge refused to order a verdict for the defendant. The jury found for the plaintiff in the sum of \$3,000; and the defendant alleged exceptions.

J. E. Hannigan, for the defendant.

F. P. Garland, (*B. Berenson* with him,) for the plaintiff.

DECOURCY, J. The plaintiff was a passenger on an open car of the defendant. In response to her signal the conductor rang the bell to stop the car, and while the speed was slackening she walked to the end of the seat preparatory to alighting. The main fact in controversy was whether the car had come to a full stop just before the accident occurred. The contention of the defendant was that the plaintiff stepped from the car while it was slowing down but still moving, and a number of witnesses so testified. But there was also testimony from which the jury could find that the car had come to a full stop in front of the white post to allow the plaintiff to alight, and that while the plaintiff was in the act of alighting she was thrown to the ground by reason of the car being started suddenly and prematurely. Upon the evidence the issues of the plaintiff's due care and the defendant's negligence were for the jury. *McDermott*

v. *Boston Elevated Railway*, 208 Mass. 104. Upon the plaintiff's story, which the jury believed, this case is unlike those cited by the defendant, where passengers were thrown down by a jerk in the motion of a car while running and not due to negligence. *McGann v. Boston Elevated Railway*, 199 Mass. 446, 448. *Stevens v. Boston Elevated Railway*, 199 Mass. 471. And see *Work v. Boston Elevated Railway*, 207 Mass. 447.

The court might well in its discretion exclude the question to the witness Alexander, asked in re-direct examination. And the defendant was not harmed by the exclusion since he obtained the evidence, in another form, from the witness. *Bennett v. Susser*, 191 Mass. 829. *Walker Ice Co. v. American Steel & Wire Co.* 185 Mass. 468, 474.

Exceptions overruled.

HERBERT L. HARDING vs. FRANK M. FORBUSH,
administrator.

Middlesex. November 24, 1911. — January 2, 1912.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DeCOURCY, JJ.

Guardian, Accounts. Res Judicata. Judgment. Executor and Administrator. Interest. Tax.

A woman, who had been under guardianship as an insane person, died and an administrator of her estate was appointed who contested an account filed by the guardian on the ground that it contained an overpayment of \$1,000 to a caretaker of the insane person. It appeared that the overpayments were due to a clerical error of the guardian, but that during the lifetime of the ward the caretaker had denied that she was overpaid and, contending that a larger sum was due her, had brought an action against the ward about three months before her death and over three years after the guardian's account above referred to had been filed, and that the guardian on behalf of the ward accepted service of the writ therein. There were hearings in that action before an auditor who reported adversely to the claim of the caretaker. After the death of the ward the administrator, with full knowledge of the overpayment to the caretaker and without consulting the guardian and without his assent, agreed to an entry of judgment for the caretaker for \$1,000 while the contest over the account of the guardian was pending in the Probate Court and paid a sum of money to her in settlement of the action. The Probate Court charged the guardian with the overpayment, which action on appeal was confirmed by a single justice of this court. *Held*, that the guardian, not being a party to the action originally brought by the caretaker against his ward and afterwards continued against the ward's estate as represented by the

administrator, could not maintain that the propriety of his payments to the caretaker had become *res judicata* through the settlement of that action by a judgment for and a payment to the caretaker.

An overpayment by a guardian to a caretaker of his ward, which was made in good faith under the circumstances of this case, was held not to warrant charging the guardian in his accounts with compound interest on the sum so overpaid.

If, after the appointment of a guardian of an insane person and the giving of a bond by him for \$1,000, the estate is increased by over \$28,000, and, for the purpose of avoiding an increase of taxation of the estate, the guardian does not file a new inventory or render any account, no loss to the ward's estate resulting, although such conduct is a breach of duty owed by the guardian to the public and as such is to be condemned, it furnishes no reason for denying to the guardian such compensation as he may have earned for his other services to the estate of the ward.

APPEAL from a decree of the Probate Court upon the first account of Herbert L. Harding as guardian of the estate of Cornelia Phelps, late of Somerville.

The account was filed on June 1, 1903, and covered a period from December 14, 1897, to May 1, 1903, and contained in schedule A items amounting to \$35,012.24, in schedule B items amounting to \$18,091.76, and in schedule C items amounting to \$16,920.48. Among the items of schedule B were items of payments amounting to \$6,700 for services of the guardian, others of payments to Austin and Hay, Esquires, attorneys employed by the guardian amounting to \$1,029.25, and others of various payments to Mrs. Cornelia F. Covell for services as caretaker and for expenses, board and lodging.

In the Probate Court the account was objected to by various presumptive heirs of the ward and was referred to an auditor on June 15, 1903. On December 20, 1906, the ward died and later the respondent was appointed administrator of her estate. In the Probate Court the auditor filed his report on February 10, 1909, and on July 2, 1909, *Chamberlain, J.*, made a decree disallowing \$3,200 of the guardian's charges for services and charging the guardian with \$1,806.48, as overpayments to Mrs. Covell.

On appeal from the Probate Court, the case was referred to Frank W. Kaan, Esquire, as master. His report among other findings contained the following:

In 1896 Cornelia Phelps of Somerville was over eighty years of age, lame and unable to leave her home or even to go up and down stairs. She was easily influenced by persons whom she liked. She had no property of her own and for several years

had been supported by an aunt, who died in that year leaving an estate of about \$90,000 and a will giving her only \$8,000, while practically all of the residue of the estate was given to one Fitch.

Herbert L. Harding, Esquire, the guardian, had been engaged in the practice of law in Boston since 1877. He was consulted in August, 1897, about the affairs of Cornelia Phelps. He called at her house in Somerville and her affairs were laid before him. Thereafter he rendered various services in controversies with John S. Patton, Esquire, who formerly had acted in a fiduciary capacity for the ward, with Fitch, executor of the estate of the ward's aunt, with a young man who with Mr. Patton's approval had received \$5,000 as a gift from his ward, and in an advisory and conciliatory manner as to his ward's daily life and surroundings.

In July, 1899, the guardian received from the estate of the ward's aunt \$23,338.94. He did not have his bond increased and filed no inventories or accounts in the Probate Court and sought no authority for a payment of fees to himself, because he desired not to disclose the size of the estate and thus to avoid taxation of the estate.

It appeared that, through a clerical error, Mrs. Covell had been overpaid by the guardian in the sum of \$1,000. She, as found by the master, "denied that the guardian had overpaid her, and made a further claim on him for earlier services rendered Miss Phelps. This claim was not assented to by Mr. Harding. He took the position that what might be due her, if anything, should be determined by legal proceedings. Accordingly," on October 13, 1906, "she brought an action on the claim against Miss Phelps while Mr. Harding was guardian" and he accepted service of the writ on behalf of the defendant. "This action, after hearings before an auditor and a report by him adverse to the claim of Mrs. Covell, was disposed of" on January 18, 1909, by an agreement for judgment for the plaintiff for \$1,000 made between the plaintiff's attorney and Mr. Patton as attorney for the administrator of the estate of Cornelia Phelps, as allowed by the court. The respondent "paid Mrs. Covell in settlement of her claim a certain sum of money, with the approval of the heirs at law of Miss Phelps, and with

knowledge on his part and on their part of the above mentioned overpayment to her by Mr. Harding. The administrator made this settlement without consulting Mr. Harding and without his assent thereto. The action so disposed of was brought to recover a sum additional to all that the guardian had paid Mrs. Covell. At the request of the guardian I find as a fact that the claim of Mrs. Covell, on which her said action was based, was in existence against Miss Phelps while the latter was under the guardianship of Mr. Harding. The guardian contends that this settlement relieves him from liability for the above mentioned overpayment of \$1,000. On the foregoing facts I rule that I am obliged to find and I do therefore find that this contention cannot be sustained and I rule also that I am obliged to find and I do therefore find that items of payment making up the overpayment of \$1,000 should not be allowed." The master also found that certain sums of payments to Mrs. Covell amounting to \$1,265.38 should be disallowed.

The master found that the amounts paid by the guardian to Austin and Hay, Esquires, for services, were less than the services were worth and that the services were obtained by the guardian at the smaller cost because of the relations existing between him and Mr. Hay.

He also found: "The services rendered by the guardian during the period covered by his account were necessary and proper under the circumstances then existing and according to the information then at his command. They involved much time, labor and responsibility and related to difficult, perplexing and disagreeable matters. He took part in about three hundred consultations with the ward and her relatives, with attorneys and others, drew and examined many legal papers, conducted important litigation, studied problems of law and carried on correspondence amounting to about four hundred letters received and written. He was obliged to antagonize an old acquaintance, take part in domestic and family disputes and on important business matters, deal with persons who appear on the evidence to have been hostile, unreliable and unscrupulous. The amount of property involved and the resultant benefits were large. There was some uncertainty as to the receipt of compensation. The services were rendered with painstaking care and the high-

est degree of fidelity to the interests of the ward. I find that the sums charged in the account by the guardian for his services are fair and reasonable and should be allowed."

The master found, therefore, that, except for the disallowed payments to Mrs. Covell and interest thereon, the guardian's account was proper. He also found that payments by the guardian which he disallowed were all made in good faith, and therefore charged him only with four per cent interest from the dates when they were made.

A decree was entered by *Braley, J.*, in accordance with the master's report; and both parties appealed.

The case was submitted on briefs.

C. P. Sampson, for the petitioner.

J. S. Patton, for the respondent.

SHELDON, J. 1. The petitioner objects that he ought not to be charged with the sum of \$1,000, the amount of overpayments which by mistake he made to Mrs. Covell. He contends that it now appears that not only this amount, but an additional sum of another \$1,000 was really due to her from the estate of his ward, because by reason of an agreement between the respondent and Mrs. Covell a judgment in her favor for that amount was entered in a suit brought by her to recover compensation for her services to the ward. But the petitioner was not a party to that suit, and after the death of his ward had no concern in defending it. There was no declaration in set-off for the overpayments. Apparently the settlement between her and the respondent was a mere compromise, a buying of his peace by the latter. But the decisive consideration is that no estoppel from the judgment rendered in that case can be invoked either for or against the petitioner as between himself and the respondent. As to him, it is not *res judicata*. It was the settlement of an independent claim made by Mrs. Covell and settled after the ward's death by the administrator of the ward's estate.

2. The findings of fact reported by the master dispose of most of the contentions made by the respondent. The petitioner should not be charged with compound interest under the circumstances here found. *Forbes v. Ware*, 172 Mass. 306. *McGeary v. McGeary*, 181 Mass. 589. *McIntire v. Mower*, 204 Mass. 238. The amounts charged for the services of the

guardian and of his counsel have been found to be reasonable and properly allowed. We have not the means of revising the conclusions of the master.

The guardian's neglect and delay in filing a new inventory and in rendering his account, and his concealment of the amount of his ward's estate to avoid the payment of taxes thereon, have not resulted in any loss to her estate. They were intended for its benefit, to avoid the payment of taxes which it ought to have paid. His conduct was a breach of the duty which he owed to the public, and as such is to be condemned; but it did not affect his relations to the estate, and furnishes no reason for denying him the compensation which he has earned for other services. If, as might have been the case, any penalty had been incurred for this breach of duty to the public, we need not now consider on whom such a penalty would have been made finally to rest. Nor is it for us now to animadvert upon the conduct of the respondent's counsel as that is disclosed by this record.

We find no error in the final decree entered in this court, and it must be affirmed.

So ordered.

NEW ENGLAND BOX COMPANY *vs.* NEW YORK CENTRAL
AND HUDSON RIVER RAILROAD COMPANY.

Worcester. October 2, 1911. — January 8, 1912.

Present: BUGG, C. J., HAMMOND, BRALEY, SHELDON, & DECOURCY, JJ.

Railroad, Liability for fire. Statute, Construction. Subrogation. Insurance.

The common law liability of a railroad corporation for damage to property due to sparks negligently allowed to escape from its locomotive engines while in use upon its road was abolished by St. 1840, c. 85, the broader remedy given by that statute, and by the succeeding statutes re-enacting its provisions, for injuries to property by fire communicated by locomotive engines being exclusive.

By St. 1895, c. 293, insurance companies, which have paid losses on property caused by fires communicated by the locomotive engines of a railroad corporation, have no right of subrogation to the remedy of the insured against the railroad corporation under the statute creating the liability of a railroad corporation for such fires.

TORT, brought in the name of the plaintiff for the benefit of certain insurance companies, to enforce an alleged common law

liability of the defendant to the plaintiff for the amount paid by such companies to the plaintiff by reason of a fire alleged to have been caused by the negligent construction, maintenance and use of locomotive engines by the defendant. Writ dated August 11, 1910.

The declaration contained, among others, the following allegations: "And the plaintiff further says that it was said defendant's duty to so operate its road and its engines running thereon that fire shall not escape and be communicated therefrom, but that on said twelfth day of March, 1910, defendant carelessly and negligently used and employed locomotive engines and other machinery that were improperly and negligently constructed or maintained and so carelessly and negligently used the same that a great quantity of fire, cinders, sparks and burning matter were thrown therefrom; and by reason of such negligence and carelessness on the part of the defendant, the plaintiff being in the exercise of due care, fire was communicated to the grass, weeds, or other material which the defendant had negligently suffered to accumulate upon its location and which escaping from defendant's said location was communicated to the pine boards so piled and stacked upon said land so owned by the plaintiff adjacent thereto as aforesaid and burned, injured and damaged a part thereof."

The defendant demurred, assigning as causes of demurrer the following:

"1. That the said declaration does not state a cause of action substantially in accordance with the rules contained in chapter 173 of the Revised Laws of Massachusetts.

"2. That section 247, Part II, chapter 463 of the Acts of 1906 provides the sole and exclusive remedy for persons or corporations whose buildings or other property have been injured by fire communicated by the locomotive engines of a railroad corporation or street railway company.

"3. That section 247, Part II, chapter 463 of the Acts of 1906 provides a remedy for persons or corporations whose buildings or other property have been injured by fire communicated by the locomotive engines of a railroad corporation or street railway company, which remedy is in abrogation of and a complete substitution for any right of action at common law based upon

the negligence of such railroad corporation or street railway company in the premises."

The case was heard upon the demurrer by *Fessenden*, J., who made an order overruling the demurrer, from which the defendant appealed; and thereupon, by agreement of the parties, the judge, being of opinion that the matter ought to be determined by this court before further proceedings were had in the Superior Court, reported for that purpose the questions of law raised by the appeal. If no error was found in the ruling of the judge, the case was to stand for a trial upon the merits; if the ruling was wrong and the demurrer should have been sustained, final judgment was to be entered for the defendant.

R. A. Stewart, (*G. H. Fernald, Jr.*, with him,) for the defendant.

J. A. Stiles, (*C. S. Anderson* with him,) for the plaintiff.

HAMMOND, J. This is an action at common law brought for the benefit of certain insurance companies to enable them to recover the amount of insurance paid by them to the plaintiff upon its lumber alleged to have been destroyed by fire communicated by sparks negligently allowed to escape from the defendant's locomotive. The case is before us upon a report made by the judge who overruled the demurrer; and the question is whether the declaration sets out a valid cause of action.

Before the enactment of any statute upon the subject a railroad corporation was answerable at common law for damages to property due to sparks negligently allowed to escape from its locomotives while in use upon its road. The gist of the action was negligence and the burden of proving negligence was upon the plaintiff. *Wallace v. New York, New Haven, & Hartford Railroad*, 208 Mass. 16, and cases cited. But from the nature of things it was difficult for the plaintiff to sustain this burden; and soon after the establishment of railroads in this Commonwealth legislation on this general subject began.

St. 1887, c. 226, provided (§ 9) that when any injury was done to any property of any person by fire communicated by a locomotive of any railroad corporation, the corporation should be held responsible in damages unless it should show that it had used all due caution and diligence; and further provided (§ 10) that any railroad corporation should have an insurable

interest in any such property and might "procure insurance thereon in its own name and behalf." This statute simply changed the burden of proof upon the question of negligence. It in no way affected the ground of liability. The gist of the action still was negligence, the ground of liability remained as before, and the sole remedy was as before by an action at common law. The statute gave no new remedy. It simply changed the burden of proof in a proceeding under the common law.

Next came St. 1840, c. 85. The first section reads as follows: "When any injury is done to a building or other property, of any person or corporation, by fire communicated by a locomotive engine of any railroad corporation, the said railroad corporation shall be held responsible, in damages, to the person or corporation so injured; and any railroad corporation shall have an insurable interest in the property for which it may be so held responsible in damages, along its route, and may procure insurance thereon in its own behalf." The second section repealed § 9 of St. 1837, c. 226. With the exception of a provision as to the relation between insurance companies and the railroad corporation in St. 1895, c. 298, the law as thus established has continued without any change. Gen. Sts. c. 63, § 101. St. 1874, c. 372, § 106. Pub. Sts. c. 112, § 214. It may be noted in passing that the same liability has been extended to street railway companies using locomotive engines. Sts. 1864, c. 229, § 84; 1871, c. 381, § 45.

What was the effect of this St. 1840, c. 85? It has been considered many times by this court. It is applicable to all property, real or personal, (*Lyman v. Boston & Worcester Railroad*, 4 Cush. 288, *Ross v. Boston & Worcester Railroad*, 6 Allen, 87,) whether the fire be directly communicated by the spark from the locomotive, or indirectly by the extension through natural and ordinary means of such a fire. The liability is not restricted to property lying immediately adjacent to the railroad track, but may extend to the distance even of a quarter of a mile and more. *Perley v. Eastern Railroad*, 98 Mass. 414. *Safford v. Boston & Maine Railroad*, 103 Mass. 583. There is no change in the method of procedure or in the rule of damages; and even the right of subrogation of the insurance company remains as before. *Hart v. Western Railroad*, 13 Met. 99. As between the

owner and the insurance company on the one hand and the railroad corporation on the other, the primary liability still remained upon the latter. While not applicable where articles are placed in the possession of the railroad corporation under a contract which fully covers the rights and liabilities of both parties regarding them, as in the case of a common carrier or warehouseman (*Bassett v. Connecticut River Railroad*, 145 Mass. 129), still in every conceivable case where there is not such a contract and where the common law liability existed it would seem to be applicable. Nor was it necessary for the owner to give any notice or take any steps as a preliminary requisite to this statutory right of action. Nor was there any reduction in the amount of damages; and the statute, in cases where applicable, fully protected the insured party as to the rights theretofore existing at common law.

It made but one change, and that was in the ground of liability. That change consisted only in the elimination from that ground of one element, namely, negligence. Before the statute negligence, which was an essential element, the *sine qua non* of liability, must be shown; after the statute negligence no longer became material. This is not a case of an additional remedy for the same cause of action upon the same ground of liability, but a change in the ground of liability. While the physical features of the liability, namely, the communication of fire from the locomotive, are the same, the ground of liability is changed. There remains, not two different grounds on either of which the injured party may proceed, but only one ground more favorable to one party and less favorable to the other than that theretofore existing, yet nevertheless, now as then, only one ground. The unit is changed, but it is still a unit. The old has yielded to the new.

In cases where the statutory action was applicable there was no further need of the common law action. We think for these reasons that the statute was intended to determine clearly and finally the rights and liabilities of the parties in a matter which by reason of the rapid development of railroads did not seem to be adequately provided for by the common law. See *Lyons v. Boston & Lowell Railroad*, 181 Mass. 551; *Wallace v. New York, New Haven, & Hartford Railroad*, 208 Mass. 16. It must be

held therefore that since the passage of the statute the only action remaining for the injured party is the one which is founded upon the liability as thereby changed and which is therein provided. We see nothing in *Ryalls v. Mechanics' Mills*, 150 Mass. 190, cited by the plaintiff, which is inconsistent with the conclusion which we have reached in this case.

Our attention has been called by the plaintiff to the case of *Dyer v. Maine Central Railroad*, 99 Maine, 195, wherein a statute similar to the one now under discussion was considered by that court and a different conclusion reached. Their statute does not seem to have been regarded by that court as so general in its application as is ours (see *Chapman v. Atlantic & St. Lawrence Railroad*, 87 Maine, 92, and *Lowney v. New Brunswick Railway*, 78 Maine, 479), but, however that may be, in so far as that case is inconsistent with the conclusion we have reached we cannot follow it.

There is no doubt that the declaration sets out a case covered by the statute, namely, damage to property by fire communicated by a locomotive engine. The plaintiff contends that it is a declaration at common law, and such it is. Such an action cannot be maintained. Even if, however, all the allegations as to negligence be regarded as surplusage and the declaration be considered as simply stating an action under the statute, it cannot be maintained. The right of the insurance companies to subrogation in a suit under the statute was taken away by St. 1895, c. 293. See *Lyons v. Boston & Lowell Railroad*, 181 Mass. 551, for a discussion upon this matter. Whichever way the declaration be taken, it does not set out any cause of action. According to the terms of the report the order is

Judgment for the defendant.

LAURA L. POWERS, administratrix, vs. CITY OF WORCESTER.

Worcester. October 3, 1911. — January 8, 1912.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DECOURCY, JJ.

Tax, Assessment. Statute, Construction. Estoppel. Words, "Debt."

A claim for damages for real estate taken for highway purposes under a statute providing for the abolition of certain grade crossings, to recover which a petition for an assessment by a jury is pending, is not taxable as a debt under St. 1909, c. 490, Part I, § 4, cl. 2, providing for the taxation of "other debts due the person to be taxed more than he is indebted or pays interest for."

The rule, that a claim for land damages is not a debt within the meaning of our tax statutes until it becomes fixed and receivable, having been established by the decisions of this court during a period of forty years, and, although many changes have been made in the laws relating to taxation, the phrase "other debts due the persons to be taxed more than they are indebted or pay interest for," as used in Gen. Sts. c. 11, § 4, having remained and being found in substance in St. 1909, c. 490, Part I, § 4, cl. 2, it must be held that, in using the word "debts" in this phrase in the various codifications in the same connection as before, the Legislature adopted the interpretation given to it by the decisions of this court as not including such unliquidated claims for damages.

Upon an appeal from a refusal of the assessors of a city to abate a tax, where it appears that the tax was assessed wrongfully upon a pending unliquidated claim of the petitioner for land damages, which was not taxable as a debt under St. 1909, c. 490, Part I, § 4, cl. 2, the fact that the petitioner under protest had included the claim, when its amount had been fixed by a settlement, in a list filed by him on the May 18 after the April 1, as of which the tax was assessed, does not estop him from claiming an abatement, the rights of the parties being determined by the situation of affairs on April 1.

PETITION, filed in the Superior Court on February 6, 1911, appealing from the refusal of the assessors of the city of Worcester to abate a tax of \$278.80 assessed as of April 1, 1910, on a claim of the petitioner for damages for land taken for highway purposes in carrying out a decree of the Superior Court confirming a report of commissioners appointed under St. 1900, c. 387, relating to the abolition of certain grade crossings in Worcester.

In the Superior Court the case was submitted to *Sander-son, J.*, upon an agreed statement of facts, which included the following:

On April 1, 1910, the petition for the land damages in question still was pending in the Superior Court. On May 10, 1910, a settlement was made, out of court, between the city and the

petitioner and an agreement for judgment was filed. On May 24, 1910, the city paid the petitioner the amount specified in the agreement, which was \$18,750.

The petitioner, as administratrix of the estate of Frank E. Powers, on May 18, 1910, which was within the time required by law, filed with the assessors of the respondent a list of the property of her intestate containing the following item, which was inserted by the assessors: "Due from city less bills for same \$17,000." This represented the claim set forth above for the amount of land taken and damage to remaining land pending in the Superior Court on April 1, 1910, and was returned by the petitioner under protest on the ground that it was not taxable. The assessors for the financial year beginning April 1, 1910, assessed a tax to the petitioner including a tax of \$278.80 on the item above set forth, which was paid by the petitioner on October 10, 1910, under a protest in writing. Within the time required by law the petitioner filed a petition for an abatement of the tax with the assessors, who made an order refusing the abatement, from which the petitioner, within the time required by law, appealed to the Superior Court by filing this petition.

If upon the agreed facts the petitioner's claim for damages pending against the city on April 1, 1910, was not taxable to the petitioner on that date, judgment was to be entered for the petitioner in the sum of \$278.80 with interest from October 10, 1910. If the claim for damages was taxable to the petitioner, judgment was to be entered for the respondent.

The judge found for the respondent; and from the judgment entered in accordance with that finding the petitioner appealed.

The case was submitted on briefs.

C. M. Thayer & J. O. Sibley, for the petitioner.

E. H. Vaughan & C. S. Anderson, for the respondent.

HAMMOND, J. A part of a piece of real estate owned by the petitioner's intestate was taken for highway purposes under St. 1900, c. 387; and the question is whether the statutory liability of the respondent to pay to the landowner the damages caused by such taking, the petition for the assessment thereof by a jury being still pending, is a "debt" due the landowner within the meaning of the general tax statute which provides that personal property for the purposes of taxation shall include "other debts

due the person to be taxed more than he is indebted or pays interest for." St. 1909, c. 490, Part I, § 4, cl. 2. The damages for land taken under the first named statute are to be assessed in the manner provided in the general statutes for the taking of land for highways. St. 1890, c. 428. St. 1900, c. 387. St. 1909, c. 490, Part I, § 4, cl. 2.

In *Fellows v. Duncan*, 13 Met. 332, it was held that the order of a city council, upon laying out a street, that a certain sum should be paid as damages for land taken does not establish the relation of debtor and creditor between the landowner and the city so that the latter could be held as trustee of the former under Rev. Sts. c. 109, § 4, Shaw, C. J., saying "it was not a debt due." In *Lowell v. Street Commissioners*, 106 Mass. 540, it was held that the damages to which a landowner was entitled for the taking of his land for the alteration of a highway under St. 1866, c. 174, were not a debt for which he was taxable under Gen. Sts. c. 11, §§ 2, 4 (the language of which so far as material to the question under consideration is identical with that of St. 1909 aforesaid), before said damages have become fixed and irrevocable. In giving the opinion Ames, J., says: "The claim for compensation for land damages, upon which this tax was laid, was uncertain in amount. It is to be submitted to a jury, which may increase or diminish the amount awarded by the city; and for this reason, as well as from its special character, it is not a debt technically, or in the sense of that term as used in pleading and in legal proceedings. *Fellows v. Duncan*, 13 Met. 332." And while there are remarks in the opinion indicating that this conclusion is not unjust in view of the peculiar provisions of that statute as to the method of computing damages and as to liability for betterments, and while that peculiarity has been commented upon as one of the reasons for the decision (see *Deane v. Hathaway*, 136 Mass. 129), still the fact remains that the claim for land damages is by reason of its special character not a debt within the meaning of our tax statutes until it has become fixed and receivable. And the case must be regarded as adopting and enunciating that principle. This decision was announced forty years ago. It was announced as the interpretation of a clause in a statute of wide application and of constant use in one of the most important functions of government, to wit, the

money raising power. Since the decision the statute has been several times under the scrutiny of the law making power and many changes have been made in it, but none in the particular clause under consideration. Throughout all the changes the words "other debts due the persons to be taxed," etc., have remained. Gen. Sts. c. 11, § 4. Pub. Sts. c. 11, § 4. R. L. c. 12, § 4, cl. 2. St. 1909, c. 490, Part I, § 4, cl. 2.

However broad may be the term "debt" (see *Woodbury v. Sparrell Print*, 187 Mass. 426, and cases cited), and whatever may be its meaning in other connections, and however close may have been originally the question whether, as used in our tax statutes, it included unliquidated damages for land taken, it must be held that since the Legislature in the various codifications has used the term in the same identical connection as before, it has adopted the judicial interpretation given to it, namely, as not including such damages. If there is to be a change in the meaning of the statute it must be effected by a legislative change of its language and not by a change in judicial interpretation of the language so long in use.

The respondent's contention that the petitioner is estopped from claiming an abatement because under protest she included this claim for land damages in the list filed by her on May 18 after the amount was fixed by settlement is untenable. The situation of affairs on April 1, the time as of which the taxes were assessed, determines the rights of the parties under the circumstances of this case. In accordance with the terms of the report there is to be judgment for the petitioner for \$278.80 and interest from October 10, 1910.

So ordered.

OSCAR D. ADAMS & another vs. NEW ENGLAND MAPLE
SYRUP COMPANY.

Hampden. October 4, 1911. — January 3, 1912.

d217-435-

Present: RUGG, C. J., HAMMOND, BRALEY, & SHELDON, JJ.

Adulterated Food. Food, Adulteration of. Sale, Validity.

A sale of "blended maple sugar," which is a well known article in the trade in which the parties to the sale are engaged, consisting in part of maple sugar and in part of granulated sugar and having been ordered as such mixture, is not a sale of adulterated food or of an imitation within the meaning of R. L. c. 75, §§ 16-18.

At the trial, before a judge without a jury, of an action for the price of certain "blended maple sugar" sold and delivered to the defendant, where the defense set up was that the sale was in violation of R. L. c. 75, §§ 16-18, the judge found, on evidence warranting such findings, that the mixture which was ordered by the defendant and delivered by the plaintiff was not adulterated food or an imitation within the meaning of the statute. It appeared by the evidence that at the request of the defendant the packages containing the sugar sold were not marked and were not labelled as containing a mixture or compound with the name and per cent of each ingredient therein. It was suggested that the defendant might have sold some of the packages as pure maple sugar, thus causing deception of the public which it was the object of the statute to prevent. On this point the trial judge found that a part of the sugar was resold by the defendant to other persons, but that, even if such sales by the defendant were in any respect unlawful, the plaintiff did not participate in them and was wholly indifferent as to the use which the defendant might make of the sugar and had no knowledge of any intention of the defendant to resell in violation of law, if any such intention existed. Held, that under these findings neither the transactions of the defendant after the sale nor the intention of the defendant at the time of the sale could prevent the plaintiff's recovery.

CONTRACT for \$358.52, the price of a quantity of blended maple sugar manufactured by the plaintiffs and delivered to the defendant. Writ dated July 15, 1910.

The answer contained, among other matters, the following:

"And the defendant further answering says that the merchandise declared upon and alleged to have been sold and delivered to the defendant was sold in violation of the statutes and laws of said Commonwealth.

"And the defendant for further answer to the plaintiff's amended declaration says that said merchandise alleged to have been sold the defendant was adulterated within the meaning of the statutes made and provided in such cases, because it was a

mixture or compound of maple sugar and a cheaper or inferior substance substituted in part for maple sugar, and that the package containing said merchandise, which was at the time a mixture or compound recognized as an ordinary article of food, or ingredients of articles of food, was not distinctly labelled as a mixture or compound with the name and per cent of each ingredient therein."

In the Superior Court the case was tried before *Schofield*, J., without a jury. Among other facts appeared the following:

The plaintiffs and the defendant made a contract through conversation and correspondence, by which the defendant ordered from the plaintiffs a quantity of blended maple sugar, which should contain as much maple sugar as the plaintiffs could put into the compound for the price agreed by the defendant to be paid, namely, ten and one half cents to eleven cents per pound.

The blended sugar was composed of maple sugar and white or granulated sugar. The compound was made by mixing both kinds of sugar with water, boiling off the water, and running the syrup into moulds in which it hardened into cakes, which were light in color. Blended maple sugar thus made is a well known article in the trade; it tastes better and is better to eat than maple sugar not mixed with white or granulated sugar. Maple sugar not mixed with white sugar is "apt to be black and strong." The plaintiff Adams testified that in making the compound he followed the defendant's direction and put into it as much maple sugar as he could to sell for the price which the defendant's president, one Marsters, said he was willing to pay.

The plaintiffs and the defendant were accustomed to handling maple sugar and syrup in trade and had had transactions between them involving blended sugar before the sale in question. The boxes did not bear any marks or any statement that the contents of them was a mixture with the name and percentage of each ingredient therein.

The judge refused to make various rulings requested by the defendant based on R. L. c. 75, §§ 16-18, the material portions of which are quoted in the opinion, and refused to rule that the merchandise sold and delivered by the plaintiffs was adulterated within the meaning of the statutes of the Commonwealth.

The judge made the following findings of fact and rulings of law:

"1. The court finds that the contract was for the sale of blended sugar, part maple and part granulated. The court finds that the meaning of the contract, which was made by conversation and correspondence, was that the plaintiff should put as much maple sugar into the blend as he reasonably could for the price agreed, ten and a half to eleven cents per pound.

"2. The plaintiff made and shipped thirty-four hundred and fifteen pounds, when he received an order, dated February 2, 1910, not to send any more. The court finds that the sugar was made and delivered in a manner which was a substantial performance of the contract. The breakage of the cakes in transit was somewhat excessive, but not enough to justify rejection. No evidence of the damage from breakage as a separate element was introduced.

"3. The defendant has disposed, by sale or otherwise, of about one half of the sugar shipped to it. It has about seventeen hundred pounds left in its possession. The court finds that there has been an acceptance and actual receipt sufficient to satisfy the sales act, St. 1908, c. 237, § 1.

"4. The plaintiff is entitled to recover the price at the rate of ten and a half cents per pound, amounting to \$358.52, with interest from the date of the writ unless the sale was illegal.

"5. The defendant contends that the sale was in violation of the statute prohibiting the adulteration of food, R. L. c. 75, §§ 16 *et seq.* The court finds as a fact that the subject matter of the contract was a mixture of two kinds of sugar. It consisted of about thirty per cent maple sugar and about seventy per cent granulated sugar. This mixture was the substance or thing contemplated and contracted for by the parties, and the court rules that the sale of it as between the parties was not a sale of adulterated food or an imitation within the provisions of R. L. c. 75, §§ 16, 17 and 18.

"The sugar was shipped by the plaintiff in one-quarter pound cakes, packed in boxes, of which four contained sixty-eight to seventy pounds, and the rest contained thirty-five to thirty-eight pounds. At the request of the defendant, the boxes did not have any marks to indicate the quality of the goods. The plain-

tiff and the defendant were accustomed to handling sugar and syrup in trade. A part of the sugar shipped by the plaintiff was in fact resold by the defendant to other persons. If the resales by the defendant were in any respect unlawful, in violation of this statute, the court finds as a fact that the plaintiff did not participate in such resales.

"The court finds that the plaintiff was wholly indifferent as to the use which defendant as purchaser might make of the sugar. He had no knowledge of any intention on the part of defendant to resell in violation of the law, if such intention in fact existed. Each of the two kinds of sugar entering into the mixture was an article of food, and not injurious to health. Upon these facts, the court rules that the defense of illegality set up by the defendant fails."

The judge found for the plaintiffs in the sum of \$369.86; and the defendant alleged exceptions, which after the resignation of *Schofield, J.*, were allowed by *King, J.*

The case was submitted on briefs.

H. W. Beal, for the defendant.

E. T. Broadhurst, for the plaintiffs.

HAMMOND, J. The only question is whether the sale was in violation of R. L. c. 75, §§ 16-18. These sections so far as material read as follows: § 16: "No person shall . . . sell, within this Commonwealth, any . . . article of food which is adulterated within the meaning of section eighteen." § 17. "The term 'food' as used . . . [in §§ 16-27, inclusive] shall include all articles, simple, mixed or compound, used in food or drink by man." § 18. "Food shall be deemed to be adulterated: 1. If any substance has been mixed with it so as to reduce, depreciate or injuriously affect its quality, strength or purity. 2. If an inferior or cheaper substance has been substituted for it wholly or in part. . . . 4. If it is in imitation of or is sold under the name of another article. . . . The provisions of this and the two preceding sections relative to food shall not apply to mixtures or compounds not injurious to health and which are recognized as ordinary articles or ingredients of articles of food, if every package sold or offered for sale is distinctly labelled as a mixture or compound with the name and per cent of each ingredient therein."

Was the sale in violation of this statute? The judge has found that the article called for by the contract was "blended sugar, part maple and part granulated," and that "the sugar was made and delivered in a manner which was a substantial performance of the contract." In other words the defendant ordered a mixture of maple and granulated sugar and the plaintiffs sent what was ordered. But none of the boxes in which the sugar was contained was "labelled as a mixture or compound with the name and per cent of each ingredient therein;" and therein, says the defendant, lies the illegality of the sale.

There is no doubt that maple sugar and granulated sugar are each a distinct article of food within the meaning of the statute, and so different that a contract for the sale of one would not be satisfied by a delivery of the other, much less by the delivery of a mixture of both. The contract in question called for neither kind of sugar in its pure state, but for a mixture; and this mixture did not bear the simple name of either kind even as between the parties. As stated by the judge, "the subject matter of the contract was a mixture of two kinds of sugar." And the commercial unit or article stipulated for was not either kind of sugar distinct from the other, but the mixture composed of both. Many an article composed of two or more ingredients is sold in the market as a unit food. A mince pie is generally understood to be a mixture of ingredients each of which may be regarded either as a distinct article of food or of drink, but no one would suppose the statute applicable to the sale of such a pie. The purchaser of the pie is not thinking of each particular ingredient, but only of the pie. To him not each individual ingredient but the mixture, the pie as a whole, is the unit, the one article of food. So in the present case the unit contracted for was the blended sugar, itself "a well known article in the trade." We think that under the circumstances disclosed by this case the ruling, that "the sale . . . as between the parties was not a sale of adulterated food or an imitation within the provisions of" the statute, was correct.

It may be urged that the object of the statute is to prevent fraud upon the public, as it doubtless is, and that the defendant may have sold these packages to some one as pure maple sugar, and that the failure of the plaintiffs to mark them, although

such failure was at the request of the defendant, contributed to the deception of such purchasers. Upon this part of the case the judge found that a part of the sugar was in fact resold by the defendant to other persons, but he further found that even if these sales were in any respect unlawful the plaintiffs did not participate in them; that the plaintiffs were wholly indifferent as to the use which the defendant might make of the sugar and had no knowledge of any intention on the part of the defendant to resell in violation of the law, if such intention in fact existed. Under these findings the subsequent transaction of the defendant, or its intention, would not prevent a recovery by the plaintiffs. *Graves v. Johnson*, 179 Mass. 53, and cases cited.

The case is simply a sale of an article of food, a mixture it is true of two other simple articles of food, but having a distinct name of its own and being known to the trade as a commercial unit of food and sold and bought as such. The sale of such an article under the circumstances disclosed by this case is not a sale of adulterated food or an imitation within the meaning of the statute.

Exceptions overruled.

THOMAS J. COFFEY vs. JOHN J. COFFEY.

Essex. November 8, 1911. — January 8, 1912.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DECOURCY, JJ.

Partnership. Contract, Construction. Equity Jurisdiction, Accounting between partners.

In a suit in equity by one of two partners in the liquor business against the other, it appeared that during a period of about four years the plaintiff and the defendant, who were brothers, had been partners in the business, which had been very profitable in the years in which licenses for the sale of intoxicating liquors were granted in the city in which the business was carried on and at other times, when only "soft drinks" were sold, barely paid expenses, and that by mutual agreement the defendant assumed the entire business management, the plaintiff acting as bartender and doing such other inside work as the business required, that each partner was to draw \$15 a week during license years and \$10 a week during other years, but that no balance was struck to determine the respective interests of the partners in the accumulated profits, that the plaintiff, having been refused an accounting by the defendant, employed an expert account-

ant, who examined the books and accounts of the firm and made a report, that thereafter the defendant for the purpose of making a division of profits up to that time, and taking as a basis the amount of money on deposit in a national bank drew a check payable to the plaintiff's order for about \$5,000, which without the plaintiff's knowledge he deposited to the plaintiff's credit as his share of the profits, that this was done just before the first day of May of a certain year, which was the end of the last license year during the partnership, and that the next year was to be a no-license year, that on the first day of May mentioned the defendant "withdrew from active management of said firm and ceased to take any part in the firm affairs," that, after many conferences and under the advice of counsel, a contract in writing was drawn and was executed by the plaintiff and the defendant. The contract recited that it was mutually agreed to terminate the partnership, that the affairs of the firm were still unsettled, that it had assets on hand and demands and claims due it and unsettled firm matters which had to be adjusted and closed up, and that, "in order to bring about a final and full settlement of the business affairs of said firm," the parties entered into the agreement. The contract then provided that the stock of liquors on hand on the first day of May mentioned should be valued by appraisers to be chosen for that purpose, that any liquors which might have been taken from that stock since the first day of May or any money collected on claims of the firm since that day by either of the partners should be accounted for, that removable fixtures and other personal property and any uncollected claims of the firm should be appraised by the same appraisers, that the appraised property should be apportioned between the parties by their mutual consent or by the appraisers, and that the appraisers should be paid out of the funds of the firm. The contract then concluded as follows: "After the division of said personal property at its appraised value, the balance of the firm money shall be divided between the parties, so that after taking into account any accounting for liquors or moneys collected or claims settled as provided in this instrument, there shall be a balance arrived at between the parties." The plaintiff contended that the settlement was only a partial one relating to the assets on hand on the first day of May mentioned and that it did not include any matters in dispute before that time. *Held*, that the contract of settlement was a final one into which all claims were merged and was a bar to the suit for an accounting, the plaintiff's only remedy being on the contract in case the defendant had failed to carry out its provisions.

BILL IN EQUITY, filed in the Superior Court on July 3, 1908, by one brother against another, for an accounting between the two as partners in a wholesale and retail liquor business carried on by them in Newburyport in the years 1903, 1905 and 1906, and also in a "soft drink" business carried on by them in 1902 and 1904, which were no-license years in that city.

The contract between the parties of March 10, 1908, referred to in the opinion, was as follows:

"This agreement made and entered into this tenth day of March, 1908, by and between John J. Coffey, Newburyport, Commonwealth of Massachusetts, party of the first part, and

Thomas J. Coffey of said Newburyport, party of the second part, witnesseth, that:

"Whereas the said parties have heretofore been engaged as partners under the firm name and style of Coffey Brothers, in the liquor and hotel business, and it is mutually agreed to terminate said partnership, and Whereas the affairs of said firm are still unsettled, it has assets on hand and demands and claims due it, and unsettled firm matters which have to be adjusted and closed up.

"In order to bring about a final and full settlement of the business affairs of said firm, said John J. Coffey and Thomas J. Coffey do now enter into this agreement, each binding himself to faithfully carry out the same.

"First. All liabilities of the firm to be paid out of the funds of the firm.

"Second. The stock of liquors which were on hand May first, 1907, shall be valued by appraisers, two to be chosen, one by each party, and the two so chosen to select a third.

"Any liquors which may have been taken from said stock since May 1st, 1907, or any money collected on claims of the firm since said May 1st, 1907, by either of said partners, shall be accounted for.

"The furnishings in the Adams House belonging to said firm shall be appraised, as also the bar, drainer, piping and registers, straiter pump, and other personal property in the stores and store houses, and also any uncollected claims of the firm, by the aforesaid appraisers.

"Third. The rent for said stores and said Adams House which may have been paid by either member of the firm shall be considered a firm liability.

"Fourth. Either party may take any of the property at its appraised value and be charged therefor. In case a portion of said personal property is not divided by mutual agreement, it may be apportioned by said appraisers at its appraised value.

"Fifth. The appraisers shall be paid out of the funds of the firm.

"Sixth. After the division of said personal property at its appraised value, the balance of the firm money shall be divided between the parties, so that after taking into account any ac-

counting for liquors or moneys collected or claims settled as provided in this instrument, there shall be a balance arrived at between the parties.

“ John J. Coffey.

Thomas J. Coffey.”

The case was referred to Thomas C. Simpson, Esquire, as master. The material facts found by the master are stated in the opinion.

The case was heard by *Bell, J.*, upon the defendant's exceptions to the master's report. The judge made a final decree, confirming the master's report and ordering that the defendant pay to the plaintiff the sum of \$3,409.30, with interest from September 24, 1908, at the rate of six per cent per annum, and that the plaintiff also recover \$62.46 as costs. The defendant appealed.

A. Withington, for the defendant.

R. L. Sisk & J. H. Sisk, for the plaintiff.

HAMMOND, J. The main question is whether the contract dated March 10, 1908, is a bar to this action. The master has found that the contract was drawn up and agreed to by the respective attorneys of the plaintiff and the defendant “after a series of conferences, [and] that there was no fraud or deceit practised or attempted by either party thereto.” The question therefore is, as stated by the master, simply one of construction.

The partnership began about May 1, 1902, and continued until March 10, 1908, when it was terminated by mutual agreement. The business which was carried on in the city of Newburyport in this State consisted, in “no-license” years, of the sale of “soft drinks, cigars, etc.,” to which was added, in “license” years, the sale of intoxicating liquors, under licenses granted to the firm. The “license” years were from May 1, 1903, to May 1, 1904, and from May 1, 1905, to May 1, 1907. The business was very profitable during “license” years, but at other times it barely paid expenses. By mutual agreement the defendant assumed the entire business management, making all purchases, paying all bills, making all deposits in the bank and drawing all checks, and keeping the books of the firm, “so far as any were kept.” The plaintiff acted as bar tender and did such other

inside work as the business required. This arrangement continued until May, 1907, when the defendant withdrew from the active management and "ceased to take any part in the firm affairs, but commencing July 8, 1907, and continuing to the dissolution of the partnership, the firm business dealing in soft drinks and cigars, was conducted by" the plaintiff in his own name. From May 1, 1908, to the close of the last "license" year on May 1, 1907, the firm leased the rooms over their store known as the Adams House. These rooms were in part occupied by the plaintiff with his family, and in part rented to lodgers. The rent of such rooms as were let was collected by the plaintiff until May, 1905, after which time it was collected by the defendant.

The master has found that during the entire time of the partnership up to May, 1907, there was no proper division of profits. Each party was to draw \$15 a week during the license years, and \$10 a week during other years, but no balance ever was struck to determine the respective interests of the partners in the accumulated profits except as follows: In August, 1906, the plaintiff, having frequently theretofore requested of the defendant an accounting but all to no avail, and suspecting that he was being defrauded of his share of the profits, employed an expert accountant to examine the books and accounts of the firm and make a report. The expert did so; and the master has found that the report of the expert was exhaustive and that it presented a fair and equitable account of the real standing of the partners in so far as it was possible to strike a balance by any available data or to arrive at any basis of settlement. On April 4, 1907, the defendant for the purpose of making a division of the profits accumulated up to that time, taking as a basis therefor the amount of money on deposit in a national bank on the previous day, without his partner's knowledge or consent, drew a check to his own order for \$4,427.26, which check he deposited to his own personal account. Subsequently, on June 19, 1907, he drew a check payable to the order of the plaintiff, as his share of the profits, of \$4,852.26. The defendant indorsed the plaintiff's name thereon and deposited the same in a national bank in Newburyport to the plaintiff's order without his knowledge, the plaintiff not being made aware of this transaction until

informed by the bank in July, 1907. "The difference in the amounts of the two checks was accounted for by the defendant in consequence of charging to himself certain loans made by him out of partnership funds and other money amounting to \$425, for which he admitted liability." This division left a small balance in the bank to settle the partnership business. The master has found "this act on the part of the defendant arbitrary and based on no proper accounting. It was simply a division of the partnership balance then standing to the credit of the partnership in the bank." Before the agreement of March 10, 1908, there seems to have been no other settlement between the parties.

During the existence of the partnership "many checks" had been "drawn by the defendant perhaps for business purposes, but the checks themselves and the books containing them have disappeared and no memoranda to show the purpose for which they were used is in existence. Also that a number of checks have been indiscriminately torn from the check books in evidence and no memoranda made of same on stubs and no satisfactory explanation given." The master also finds that some checks and at least one account book were missing, and generally that the books and accounts were not well kept.

With this history behind them and under these circumstances the parties signed the contract dated March 10, 1908. What is the fair construction of it? The defendant contends that it provides for a full and final settlement of all partnership affairs and all matters of dispute between the parties. The plaintiff contends that it "was intended for and provided only for the settlement of certain partnership assets fully set forth therein, and in no sense provides for the settlement of any matters in dispute prior to May 1, 1907," and that it is in no way a bar to the right of the plaintiff for an accounting for the period before that time.

The document recites that whereas the parties have been engaged as partners in the liquor and hotel business, and have agreed to terminate the partnership, and "the affairs of said firm are still unsettled," that "it has assets on hand and demands and claims due it, and unsettled firm matters which have to be adjusted and closed up," now therefore, "in order to bring about

a final and full settlement of the business affairs of said firm," they enter into the agreement, each binding himself faithfully to carry out the same.

It then provides in the first clause that the liabilities of the firm are to be paid out of the funds of the firm; in the second clause that the liquors which were on hand May 1, 1907, shall be appraised by persons to be chosen for that purpose; that any liquors which may have been taken from the stock since May 1, 1907, or any money collected on claims of the firm since May 1, 1907, by either of the partners, shall be accounted for; that the "furnishings in the Adams House belonging to the firm as also the" fixtures "and other personal property in the stores and store houses, and also any uncollected claims of the firm," shall be appraised by the above mentioned appraisers; in the third clause, that the rent for the stores and the Adams House which may have been paid by either member of the firm shall be considered a firm liability; in the fourth clause, that the appraised property may be apportioned between the parties by their mutual consent or by the appraisers; in the fifth clause, that the fees of the appraisers shall be paid out of the funds of the firm; and in the sixth clause, that after the division of the personal property at its appraised value, "the balance of the firm money shall be divided between the parties, so that after taking into account any accounting for liquors or moneys collected or claims settled as provided in this instrument, there shall be a balance arrived at between the parties."

Briefly summarized, the purpose of the instrument is to make a final and full settlement of the firm affairs and to that end it provides for the distribution of the liquors which were on hand May 1, 1907, the end of the last license year, and of the other personal property, for the payment of the liabilities of the firm including the rent of the store and Adams House and the fees of the appraisers. Nothing is said about the accounting by either party for any money collected before May 1, 1907. The sixth clause provides for liquors or for money collected "as provided in this instrument," that is for liquors taken and money collected since May 1, 1907.

It is to be noted that this instrument was not signed hastily or inadvisedly, but after many conferences and under the advice

of counsel. It was the declared purpose of the instrument to make a final and full settlement of the affairs of the firm. Just before May 1, 1907, the plaintiff had received a check for several thousand dollars as the share of the profits up to that time said by the defendant to be due him. Since then the business had been conducted wholly by the plaintiff for about eight months, and he had made nothing. The next year, from May, 1907, to May, 1908, was to be a no-license year, and the firm had concluded to dissolve. There was no occasion for a partial settlement. A final and full settlement was the thing desired, and it was to be brought about by this agreement. The only accountability for money collected was to be confined to money collected after May 1, 1907. We are of opinion that everything was merged into this agreement. Such is the interpretation suggested by the circumstances and such is its plain language.

It is admitted, as the master states, that the division provided for in this contract has taken place. The only remedy of the plaintiff is upon the contract.

The result is that the decree must be reversed and the bill dismissed. It is

So ordered.

ANTONIO LOPES vs. MICHAEL R. CONNOLLY.

Essex. November 8, 1911. — January 3, 1912.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DECOURCY, JJ.

Unlawful Interference. Assignment, Of wages. Damages, In tort. Evidence, 213-652. Remoteness. Practice, Civil, Conduct of trial, New trial, Exceptions.

One, who serves on the employer of a workman a notice of a supposed assignment of wages by the workman, which in fact, was made by a different person of the same name, and on being informed by the workman of the mistake unjustifiably refuses to withdraw the notice and thereby causes the workman's discharge, is liable to the workman in an action of tort for the damages resulting from this unlawful interference with his employment.

In an action for wrongfully causing the discharge of the plaintiff from his employment as a laster in a shoe factory by serving on the plaintiff's employer a notice of an assignment of wages to the defendant supposed by the defendant to have been made by the plaintiff, which in fact was made by a different person of the same name, and refusing unjustifiably to withdraw the notice after information

from the plaintiff of the mistake, where it appears that the plaintiff had been employed in the factory for five or six years and was employed by the piece, that he could be discharged by his employer at any time and could leave the employment at any time, and that he was paid weekly, the plaintiff, upon the question of damages, may show that by reason of the notice of the supposed assignment his wages for three successive weeks were withheld from him by his employer and were paid to him only at a later time, that the notice caused the loss of his regular employment, and that, after his discharge, although using due diligence, he had been for a long time unable to obtain regular work and was compelled to subsist on the precarious earnings which he was able to procure from other sources of employment.

In an action for wrongfully causing the discharge of the plaintiff from his employment as a laster in a shoe factory, where it appeared that the plaintiff's loss of employment was due to the tortious acts of the defendant, that the plaintiff before his discharge was employed regularly at the factory by the piece, that his employment was terminable at the will of his employer or himself, and that he was entitled to recover the fair value of his contract of service, which he had lost by reason of the acts of the defendant, the presiding judge rightly permitted the plaintiff to testify that after his discharge, although using due diligence, he had been unable to obtain regular work, and to show the precarious earnings which he was able to procure from other sources of employment. The period covered by the plaintiff's examination in regard to such other employment after his discharge was about twenty-three months. *Held*, that the period, which the judge in his discretion permitted to be covered by the examination in regard to the plaintiff's employment, did not appear to have been so unreasonably extended that his decision upon it should be revised.

In an action for wrongfully causing the discharge of the plaintiff from his employment as a laster in a shoe factory by serving on the plaintiff's employer a notice of an assignment of wages to the defendant supposed by the defendant to have been made by the plaintiff, which in fact was made by a different person of the same name, and refusing unjustifiably to withdraw the notice after information from the plaintiff of the mistake, it was *said*, that, besides other damages which the plaintiff was entitled to recover, the defendant's persistent and wilful interference also subjected the plaintiff to the injustice and discouragement of having his earnings withheld and to the perplexity of decision as to what course he must take not only to vindicate his rights but to prevent the impending loss of his employment, and that for this mental distress and anxiety reasonable compensation could be recovered.

The denial of a motion for a new trial asked for on the grounds that the verdict was against the evidence and that the verdict was against the law, which were based on questions open at the trial, is not subject to exception.

The denial of a motion for a new trial asked for on the ground that the verdict was against the weight of evidence is within the discretion of the trial judge and is not subject to exception.

The denial of a motion for a new trial asked for on the ground that the damages returned by the jury were excessive is within the discretion of the trial judge and is not the subject of exception.

Where a trial judge in denying a motion for a new trial, asked for on grounds that are wholly within his discretion, makes an order that he "in the exercise of his discretion overrules the motion," the fact that he files with the order a memorandum giving the reasons for his action has no effect upon the order, of which the memorandum is no part, being merely for the information of counsel.

TORT for wrongfully causing the discharge of the plaintiff by his employer, one Cross, a shoe manufacturer in Lynn, by serving a notice on Cross falsely stating that the plaintiff had made an assignment of his wages to the defendant, and by wilfully refusing to withdraw such notice after the defendant had been informed by the plaintiff that he never had made such an assignment. Writ dated January 12, 1909.

In the Superior Court the case was tried before *Schofield, J.* It appeared that the defendant, who testified that he was engaged in the real estate, piano and storehouse business and in lending money on real and personal property, had lent money to a man named "A. Lopes," who had made to the defendant an assignment of his wages, and that one Phillips, a clerk of the defendant, having been informed that a man of that name was employed by Cross, caused a notice to be served on Cross, stating in substance that the plaintiff had made an assignment of his wages to the defendant, and directing Cross not to pay the plaintiff such wages until further notice from the defendant, that Cross withheld from the plaintiff three weeks' wages payable to him on December 24 and 31, 1908, and January 7, 1909, and on January 8, 1909, discharged the plaintiff, afterwards paying the three weeks' wages on January 14, 1909, when the defendant wrote on the back of the notice a release of the assignment he had claimed. The defendant testified at the trial that the plaintiff was not the man to whom he lent the money and who had made an assignment of wages to him. The plaintiff, among other matters, testified that he was a hand laster and had worked at his trade in Lynn about twenty years; that he had worked for Cross about five or six years up to January 8, 1909; that he worked for Cross by the piece, and received his wages at the end of each week; that he earned on an average from \$15 to \$16 per week; that on December 24, 1908, the pay day, he did not receive his wages; that he saw the bookkeeper with reference to the non-payment of his wages, and as a result of his talk with her he went to the defendant's place of business and the following conversation took place between him and the defendant: "I said, 'Are you Mr. Connolly?' He said, 'Yes.' I said, 'Are you the gentleman that trustee'd the pay down to Cross's office of A. Lopes?' He said, 'Yes.' I said, 'What

for?' He said, 'Well, you owe money to the office.' I said, 'I don't owe you no money; I never got anything from you, Mr. Connolly. You must have made a mistake.' He said, 'I know what I am talking about; I know what I am doing.' I said, 'Mr. Connolly, you must have made a mistake somewhere. I don't owe you nothing. I never got anything from you.' He said, 'I know what I am doing.' I said, 'Well, Mr. Connolly, if you act that way I will have an action against you.' Connolly said, 'All right, bring it in. We will fix it.' "

It was agreed "that the plaintiff worked at Cross's by the piece, and could be discharged by Cross at any time and could leave his employment at any time." Subject to exception by the defendant the judge allowed the plaintiff to testify in regard to the work that he had obtained after his discharge by Cross and the pay that he received for it. The plaintiff's examination upon this subject covered a period from the time of his discharge until "two weeks before Christmas, 1910."

At the close of the evidence the defendant asked the judge to give the following instructions:

"1. Upon all the evidence the plaintiff is not entitled to recover and the jury should return a verdict for the defendant.

"2. If the jury find that the defendant was the assignee under an assignment of wages from a man by the name of A. Lopes, and this defendant had reasonable cause to believe that said A. Lopes worked for John H. Cross, the plaintiff's employer, and caused notice of such assignment to be served on said Cross, this defendant is not liable for damages occasioned the plaintiff by reason of said Cross refusing to pay the plaintiff his wages, or by reason of said Cross discharging the plaintiff from his employ.

"3. If the jury find that the defendant was the assignee under an assignment of wages from a man by the name of A. Lopes, and caused notice of such assignment to be served on John H. Cross, the plaintiff's employer, this defendant is not liable for damages occasioned the plaintiff by reason of said Cross refusing to pay the plaintiff his wages, or by reason of said Cross discharging the plaintiff from his employ.

"4. If the jury should find for the plaintiff, they are not to consider as an element of damages that the plaintiff's employer refused to pay him (the plaintiff) his wages when due.

"5. If the jury find for the plaintiff, they are not to consider as an element of damages that the plaintiff's employer discharged him from his employ.

"6. If the jury should find for the plaintiff, then their verdict must be for nominal damages."

The judge refused to give any of these instructions, and submitted the case to the jury with other instructions.

In regard to the evidence of the amount of the plaintiff's earnings, referred to above, the judge gave the following instruction: "Evidence was also introduced as to what the plaintiff had been doing since the time when he says he was discharged by John H. Cross and Company [Cross] and what wages he had been earning. I wish you to understand very clearly, gentlemen, the proper use to be made of the evidence in regard to what the plaintiff was earning both before and after the time of his discharge. If in the course of your deliberations you come to this matter of awarding damages for the discharge of the plaintiff from his employment you must understand that the evidence as to what the plaintiff was earning both before his discharge and after his discharge was admitted and can be used only as evidence to the jury to enable them to decide accurately, what was the employment or contract worth to the plaintiff at the time when he was discharged. It would not be proper, gentlemen, for you to take the evidence as to what the plaintiff has been doing since his discharge and figure up the amount of money which he has earned and compare it with the amount which he earned during a similar time before he was discharged and award the plaintiff a sum for loss of time since he was discharged from his employment. The plaintiff is not entitled to recover for loss of time since his discharge. He is, however, entitled to recover, if he proves liability and proves that his discharge was the natural and probable consequence of the act for which the defendant is shown to be liable, such sum as the jury deems measures the value of that contract to him at the time he was deprived of it by being discharged from his work. It is just the same as if it were a tangible piece of property which was destroyed. The question for the jury would be, what was the value of that property at the time it was destroyed? In this case the immediate value under consideration is the value of an employment terminable at will at the time

when the man is discharged by reason of the act of the defendant. That is a question for the jury in the exercise of their fair and impartial judgment to pass upon in the light of all the evidence, using the evidence for the purpose which I have stated."

The jury returned a verdict for the plaintiff in the sum of \$395.42. The judge submitted to the jury the special question, "What sum, if any, did the jury allow as damages to the plaintiff for his discharge from his employment?" The jury answered, "\$95.42."

The defendant filed a motion for a new trial for the following reasons: "1. That the verdict is against the evidence. 2. That the verdict is against the weight of the evidence. 3. That the verdict is against the law. 4. That the damages therein rendered are excessive."

This motion was argued by counsel, and the judge filed the following order:

"1. The court rules that the defendant is not entitled as matter of law to a new trial, and in the exercise of its discretion overrules the motion.

"2. The jury were instructed that if Phillips, the defendant's clerk, served the notice of assignment with the intention that it should apply to the individual working at the Cross factory under the name of Antonio Lopes and his wages were stopped as a result, the defendant would be liable. They were also instructed that the damages to be awarded must be confined to injury to the plaintiff in his property, excluding offense to his feelings. There were two principal elements of damage, unlawful detention of wages and discharge from employment. The jury were not told that they were limited to interest on the wages detained, nor instructed more definitely than above stated how to estimate the damages for detention of wages. No instruction was given to apply in case the jury should find that the tort was wilful or malicious.

"3. There was evidence in the case from which the jury might have found that the clerk Phillips recklessly concluded without proper investigation that Antonio Lopes, the workman at Cross's factory, was identical with A. Lopes, the defendant's real debtor. They might also have found that when the plaintiff informed Connolly that his wages were stopped, Connolly asserted that

the plaintiff did owe him money, and allowed the stop order to remain upon his wages wilfully under circumstances that might be found upon the evidence to be a wilful and wanton disregard of the plaintiff's rights.

"4. On this view of the facts, if it was the view finally taken by the jury, they might have had doubt as to how to apply their instructions. They were instructed in terms that they could not consider offense to the feelings of the plaintiff, but they might have supposed that they could consider insulting acts or conduct on the part of the defendant. The court believes that upon correct principles of law the jury would be at liberty to consider circumstances of wilfulness or wantonness on the part of defendant as an aggravation of the injury and to award reasonable compensation for the entire wrong, including the aggravation.

"This principle was applied in *Meagher v. Driscoll*, 99 Mass. 281, 285, in trespass to real estate, and was recognized as applicable in an action on the case in *White v. Dresser*, 135 Mass. 150, 152, if facts existed which would justify its application. In this case there was evidence which would fully justify the jury in finding circumstances of aggravation. If they did so, and considered those circumstances in estimating damages (and it is possible that they did), the court believes and rules that they would not have violated the law, in view of the nature of their instructions and all the circumstances. The court is convinced that the jury made an honest effort to perform their duty conscientiously, and declines to interfere with their action.

"Motion for new trial overruled."

The defendant alleged exceptions, which, after the resignation of *Schofield, J.*, were allowed by *Hardy, J.*

J. H. Sisk, (*R. L. Sisk* with him,) for the defendant.

G. P. Beckford, for the plaintiff.

BRALEY, J. The jury might have been convinced, if no evidence except that of the defendant had been introduced, that there had been an innocent mistake of identity when the defendant, who held as security an assignment of the wages of his debtor, whose name corresponded exactly with the name of the plaintiff, notified the plaintiff's employer, that thereafter no wages were to be paid to the assignor until the amount remaining due had been satisfied. R. L. c. 189, §§ 27, 32-34. St. 1906, c. 390.

But concededly the plaintiff was not the defendant's debtor, and, if the jury believed the plaintiff's testimony as their verdict fully indicates, the defendant, upon being informed of this mistake, instead of rectifying the error insisted upon his right to retain the money, and refused to withdraw the notice. If the defendant had attempted to collect the debt by garnishment under R. L. c. 189, this refusal would have been abundant proof of an abuse of legal process. *White v. Apsley Rubber Co.* 194 Mass. 97. *Paine v. Kelley*, 197 Mass. 22. The result accomplished by the notice being indistinguishable, the defendant, who acted at his peril, is answerable in damages which are measured by the natural and probable consequences resulting from the attempt to enforce a groundless claim. *Burt v. Advertiser Newspaper Co.* 154 Mass. 238, 245. *Markham v. Russell*, 12 Allen, 573.

It is certain that the plaintiff was deprived of his wages as they accrued weekly, and he also could show, and, on his evidence of the statements of the foreman at the time of dismissal, and which for this purpose were relevant, the jury could find, that loss of his regular employment also followed. *Zinn v. Rice*, 161 Mass. 571, 574. *Costello v. Crowell*, 133 Mass. 352. The plaintiff's further evidence, that after his discharge, although using due diligence, he had been unable to obtain regular work and was left without his accustomed means of subsistence, as well as the statement of his precarious earnings from other sources of employment, were admissible.

If the contract had been for a stated term at a fixed compensation, the measure of damages upon a breach by his employer ordinarily would have been the difference between what he would have received and what in fact he had earned, or by proper exertion might have earned, in the same or some other occupation during the unexpired time. *Cutter v. Gillette*, 163 Mass. 95. *Busell Trimmer Co. v. Coburn*, 188 Mass. 254. The plaintiff's employment was terminable at the will of either party, but this condition does not relieve the defendant, whose wrongful act and not the will of the employer caused him to lose a position, in which the jury could find that so long as his work proved satisfactory his employment would have continued, subject, of course, to any uncertainties of the business and of his ability to labor. The defendant, having procured the plaintiff's discharge

and forced him to enter a field of competition where opportunities for obtaining work under similar conditions of good will with a reasonable prospect of continuity of service, or indeed remunerative work of any kind appear to have been exceedingly limited, and if employment was obtained its continuance was transitory, was liable in damages for the fair value of the plaintiff's contract of service and any loss of time attributable to these tortious acts. *Hill v. Winsor*, 118 Mass. 251, 259. *Smethurst v. Barton Square Independent Congregational Church*, 148 Mass. 261, 265. *Pye v. Fazon*, 156 Mass. 471, 475. *Stynes v. Boston Elevated Railway*, 206 Mass. 75. *Richards v. Johnston*, 46 Mich. 297.

The instructions were sufficiently favorable to the defendant, and the period of examination permitted by the presiding judge in his discretion does not appear to have been so unreasonably extended that his decision should be revised. *Reynolds v. Ocean Ins. Co.* 22 Pick. 191. *Spoor v. Spooner*, 12 Met. 281, 285. *Lane v. Moore*, 151 Mass. 87, 91.

The defendant's persistent and wilful interference also subjected the plaintiff to the injustice and discouragement of having his earnings withheld, and to the perplexity of decision as to what course he must take not only to vindicate his rights, but to prevent the impending loss of his situation, and for this mental distress and anxiety reasonable compensation could be recovered. *Fillebrown v. Hoar*, 124 Mass. 580. *Chesley v. Thompson*, 187 Mass. 186. *Lombard v. Lennox*, 155 Mass. 70. *Moran v. Dunphy*, 177 Mass. 485. But the accidental omission to instruct the jury, that, where there is evidence of a wilful wrong compensatory damages may be enhanced for injured feelings without being specifically set forth in the declaration, was not called to the attention of the judge. *Meagher v. Driscoll*, 99 Mass. 281, 285. *Wheeler-Stenzel Co. v. American Window Glass Co.* 202 Mass. 471.

The defendant, however, even if no error appears in the admission of evidence and the denial of his requests, relies upon the refusal to grant his motion for a new trial as ground for reversal. If we assume from the general statement at the close of the exceptions that the question was saved, the defendant, while conceding that the order overruling the motion cannot of itself be reviewed, asks to have it set aside as matter of law be-

cause the reasons assigned were erroneous. The first and third grounds of the motion raised questions which, having been open at the trial, are not the subject of exception when presented in a motion for a new trial. *Garrity v. Higgins*, 177 Mass. 414. The second ground, that the verdict was against the weight of evidence, having been addressed solely to the discretion of the trial court, only the reasons for not allowing the motion on the fourth ground of excessive damages remain. *Capron v. Anness*, 136 Mass. 271. It was wholly discretionary whether a new trial should be granted on this ground, and no rulings of law were intended, or were made.

The order denying the motion * stated the final action of the judge of which the subsequent reasons for the decision formed no part, but were merely for the information of counsel. *Welsh v. Milton Water Co.* 200 Mass. 409, 411.

Exceptions overruled.

RAYMOND L. CLEVELAND vs. THOMAS W. PEIRCE.

Essex. November 9, 1911. — January 3, 1912.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DECOURCY, JJ.

Contract, Whether joint or several.

At the trial of an action, which was upon an alleged oral agreement by the defendant to indemnify the plaintiff for any loss he might sustain if he should become one of two sureties upon the bail bond of a third person, the defendant contended that the agreement which he made was to hold the plaintiff and the other surety harmless up to the amount of the bail bond only, that the agreement was joint and not several, and that he had been discharged from liability thereon by a settlement with the other surety, but, it appearing from an examination of the record before this court that there was evidence to substantiate the plaintiff's contentions, the questions, whether the defendant made the promise alleged, and whether that promise was several or was joint, were held to have been questions of fact for the jury.

CONTRACT upon an alleged oral agreement of the defendant to hold the plaintiff harmless and indemnify him for any loss he

* As to the statement required upon an order granting a new trial, see St. 1911, c. 501.

might sustain by reason of his becoming a surety with one Donaldson upon a bail bond of one Charles J. Averill. Writ dated March 24, 1908.

In the Superior Court the case was tried before *Raymond, J.* There was evidence on the plaintiff's behalf tending to show the agreement relied on, and that, although the defendant made a like agreement with Donaldson, the agreements were several and not joint. The defendant contended and introduced evidence tending to show that there was a joint agreement, that an action against the defendant by Donaldson had been settled by a judgment entered by agreement, and therefore that the claim of the plaintiff against the defendant had been discharged.

At the close of the evidence the defendant asked for rulings, (1) that the action could not be maintained upon the evidence; (2) that the evidence tended to show only a liability to the plaintiff jointly with Donaldson, and that the defendant was not liable to the plaintiff alone; (3) that the defendant was only liable to the sureties in one sum of \$2,000, the amount of Averill's bail bond; and (4) that, if the defendant was liable to the plaintiff and Donaldson, whether jointly or severally, upon the bail bond, then the judgment and satisfaction by the defendant recovered by Donaldson was a bar to further recovery.

The rulings were refused. The jury found for the plaintiff in the sum of \$641.41; and the defendant alleged exceptions.

D. L. Smith, for the defendant.

S. Parsons & G. C. Donaldson, for the plaintiff, were not called upon.

HAMMOND, J. Whether the promise was made by the defendant and whether it was a joint or several promise were upon the evidence clearly questions of fact for the jury. If the liability was several, each promisee must sue alone; and a recovery by one on the promise made to him would be no bar to an action by the other on the promise made to this other. All the requests were therefore rightly refused. The exception to the admission of the record is not argued, and in view of its untenable nature we consider it waived.

The exceptions are frivolous and are overruled with double costs, and interest at the rate of twelve per cent a year upon the

amount of damage as found by the jury from the time the exceptions were allowed; and it is

So ordered.

AMESBURY AND SALISBURY GAS COMPANY vs. CHRISTOPHER
J. GIBNEY.

Essex. November 9, 1911. — January 3, 1912.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DECOURCY, JJ.

Contract, What constitutes, Implied in fact. Gas Company.

At the trial of an action by a gas company against a customer for the difference between \$7 and the amount registered and deposited during a year in an automatic gas meter of the plaintiff, which allowed a certain amount of gas to pass through it each time that twenty-five cents was deposited in a slot, and which was used by the defendant, the defendant's counsel admitted that meter rent was collected and under the law might be demanded by gas companies, and there was evidence tending to show that the meter at the defendant's request had been placed in a house at a summer resort where he used it for a season of about four months; that previous to the year for which the plaintiff sought rent the plaintiff informed the defendant by letter that the plaintiff would enforce the law allowing it "to get \$7 from each consumer as a minimum and that if that amount was not paid" the defendant's meter "would be removed and the supply of gas stopped;" that the defendant never expected to have the gas turned on except during the summer season and never requested to have it turned on at any other time; that the defendant did not reply to the plaintiff's notification, but used the meter for getting gas during the summer season only of the year in question. *Held*, that the jury were warranted in inferring that the defendant assented to receiving gas on the terms of the notice, and that there was nothing in R. L. c. 58, § 12, inconsistent with the making of such a contract.

CONTRACT upon an account annexed for "rent due on gas meters." Writ in the Second District Court of Essex dated August 3, 1909.

On appeal to the Superior Court, the case was tried before Fox, J. It appeared that the plaintiff relied upon that part of R. L. c. 58, § 12, which reads, "No charge for the use of a meter during any portion of twelve consecutive months shall be made if the consumer during said time uses gas to the value of seven dollars;" that the items of the declaration represented the amounts by which the value of gas used at each meter each

year fell short of \$7; and that the meters were the property of the plaintiff and were of an automatic variety, whose operation was described in the bill of exceptions as follows: "consumers wishing gas could deposit a twenty-five cent piece into them through a slot. Gas then would flow through the meters until a certain amount had passed, when the meters would automatically stop the flow until another coin was inserted."

During the direct examination of a witness for the plaintiff, counsel for the defendant stated to the presiding judge: "We admit that meter rent is collected and we admit under the law it may be demanded."

Other facts are stated in the opinion.

At the close of the evidence the defendant asked the presiding judge to rule and instruct the jury that, "if the plaintiff failed during each of the years in question to keep throughout the year a supply of gas to flow through the meters of the defendant's house and the defendant did not use gas to the value of seven dollars through any meter during each of those years, the plaintiff could not legally make a charge against the defendant for the use of a meter during either of those years."

The ruling was refused. The jury returned a verdict for the plaintiff on two items of the declaration in the sum of \$5; and the defendant alleged exceptions.

The case was submitted on briefs.

R. E. Burke & E. E. Crawshaw, for the defendant.

A. W. Reddy, for the plaintiff.

HAMMOND, J. Upon the evidence including the admission made at the trial by the defendant through his counsel, the jury might have found that the season for the furnishing of gas by the plaintiff to the summer resort where the defendant's houses were situated did not exceed four months in a year; that during the season of 1908 the plaintiff's meters for the use of which this action was brought were in the defendant's houses at his request or desire; that before the beginning of the year 1908 the defendant duly received a notice from the plaintiff to the effect that the latter would enforce the law allowing it as a gas company "to get \$7 from each consumer as a minimum and that if that amount was not paid his meters would be removed and the supply of gas stopped;" that under the circumstances

the defendant never expected to have the gas turned on except at the usual annual season of four months, and that he never requested to have it turned on at any other time; that he made no reply to such communication nor asked the plaintiff to take out the meters, but actively used them in procuring gas for his use during the whole season of 1908 without making any protest whatever. As a natural inference from these findings they might further find that the defendant assented to the terms of the notice and that the meters were used by him in compliance therewith; that these terms entered into the contract between him and the plaintiff; and that in accordance with the contract as thus established there were due to the plaintiff the sums named in the third and fourth items. This would make out a case for these items which were the only ones on which the jury held the defendant.

There is nothing in R. L. c. 58, § 12, upon which the defendant relies, inconsistent with the making of such a contract.

Exceptions overruled.

MICHAEL T. CARROLL vs. BOSTON ELEVATED RAILWAY
COMPANY.

Suffolk. November 18, 1911. — January 8, 1912.

Present: RUGG, C. J., HAMMOND, SHELDON, & DECOURCY, JJ.

Evidence, Declarations of deceased persons.

Before a declaration made by a person afterwards deceased can be admitted as evidence under R. L. c. 175, § 66, the presiding judge must find that the declaration was made in good faith, before the commencement of the action and upon the personal knowledge of the declarant, and the burden of establishing such facts is upon the party offering the evidence. In the present case, where the presiding judge excluded such evidence because he was not satisfied that the declaration was made in good faith before the bringing of the action and on the personal knowledge of the declarant, it was held, that upon an examination of the record it could not be said that the presiding judge was not justified by the evidence in his conclusion.

TORT for personal injuries alleged to have been due to a street car of the defendant being negligently run into a wagon in which the plaintiff was driving. Writ dated September 27, 1906.

In the Superior Court the case was tried before *Brown, J.*

There was evidence tending to show that the accident happened on September 15, 1906, and that at the time the plaintiff saw one Sloane on a sidewalk but a few feet away; that Norman E. McPhail, Esquire, then recently admitted to the bar, was employed by the plaintiff to act as his attorney in the case, that he interviewed Sloane on September 26, 1906, which was the day before this action was brought, and that Sloane made to him a statement as of his own knowledge relating to the circumstances of the accident. Sloane died March 9, 1907, before the trial.

Mr. McPhail then testified as follows in reply to questions by the presiding judge: "Q. Well, did you tell him [Sloane] you were proposing to bring suit? A. He knew what I was there for, yes, sir. — Q. He knew he was giving testimony in relation to a prospective suit? A. Yes. — Q. Did he know that bringing suit depended on what he said? A. I couldn't say as to that."

The presiding judge then said to the plaintiff's counsel, "I don't think I shall let you have it," and the plaintiff's counsel replied, "Well, your Honor, I supposed statements made in good faith before the beginning of the suit would be admitted." The presiding judge then stated: "If they were made for the purpose of bringing a suit, I should not allow them. It is not, in the sense of the statute, before the bringing of the suit. They are part of the bringing of this suit. The suit was brought the next day after this interview."

The witness further stated that he told Sloane that he would testify in an action which was to be brought.

The bill of exceptions, after a recital of the foregoing facts and of an offer by the plaintiff as to what the statement of Sloane comprised, stated: "On the foregoing the presiding judge refused to permit the witness McPhail to testify as to the declaration or statement made to him by said Sloane, because he was not satisfied that they were made in good faith before the beginning of the suit and on the personal knowledge of the declarant within the meaning of the statutes."

The jury found for the defendant; and the plaintiff alleged exceptions.

P. J. Donaghue, for the plaintiff.

R. M. Bowen, for the defendant.

HAMMOND, J. In order for the declaration of Sloane, the deceased, to become admissible, it was necessary for the presiding judge to find that the declaration was made in good faith, before the commencement of the action and upon the personal knowledge of the declarant. R. L. c. 175, § 66. The statement was excluded because the presiding judge was not satisfied that these conditions of the statute had been complied with.

We cannot say that the presiding judge in coming to this conclusion was not justified by the evidence. He saw the witness McPhail, and may not have been satisfied that his statement, that the interview with Sloane took place before the commencement of the action, was exact, or he may not have been satisfied in view of all the evidence in the case that the statement of the deceased was made in good faith. The burden was upon the party offering the evidence to satisfy the presiding judge that there had been compliance with the conditions of the statute.

Exceptions overruled.

HAROLD W. BROWN, trustee, vs. NATHAN A. PELONSKY.

Suffolk. November 13, 1911. — January 3, 1912.

Present: RUGG, C. J., HAMMOND, SHELDON, & DECOURCY, JJ.

Bankruptcy, Unlawful preference. Practice, Civil, Exceptions. Payment. Sale.

At the trial of an action by a trustee in bankruptcy against a creditor of the bankrupt to recover, under the provisions of § 60, a, b, of the bankruptcy act of 1898 as amended in 1903, payments alleged to have been made as unlawful preferences by the bankrupt to the defendant, there was evidence tending to show that the bankrupt's wife was the defendant's first cousin, that the bankrupt had known and had had business relations with the defendant for many years, buying goods of him on credit and making payments on account and sometimes owing the defendant considerable amounts of money, that a year and four months before the bankruptcy the bankrupt owed the defendant over \$2,500 and that the defendant never had asked the bankrupt for any notes; that for more than five months before the bankruptcy the bankrupt was insolvent; that four months and three days before the bankruptcy the defendant demanded from the bankrupt twenty-six notes bearing interest at twelve per cent per annum, payable at monthly intervals and amounting in all to the bankrupt's then indebtedness to him, \$1,962; that such methods were not in the usual course of business between them; that thereafter for all merchandise sold by the defendant to the bankrupt he received a check of the bankrupt dated ten days ahead, that most of such

checks afterwards were cashed, and that several of the monthly notes also were paid, all such payments being made within four months of the bankruptcy. Four months and three days after the giving of the notes, the bankrupt filed a voluntary petition in bankruptcy showing liabilities amounting to \$7,002 and assets amounting to \$315. The defendant asked the presiding judge to rule that the evidence was insufficient to justify a verdict for the plaintiff. The ruling was refused. *Held*, that the ruling properly was refused, since there was evidence warranting the jury in finding that the bankrupt intended to and did prefer the defendant, and that the defendant had reasonable cause to believe and did believe that the bankrupt so intended.

At the trial of an action by a trustee in bankruptcy against a creditor of the bankrupt to recover, under the provisions of § 60, a, b, of the bankruptcy act of 1898 as amended in 1903, payments alleged to have been made as unlawful preferences by the bankrupt to the defendant, there was evidence warranting the jury in finding for the plaintiff as to some at least of the payments. At the close of the evidence, the defendant asked the judge to rule "that the evidence was insufficient to justify a verdict for the plaintiff." The ruling was refused and there was a verdict for the plaintiff in a sum less than the total amount claimed in the declaration. The defendant alleged an exception only to the refusal to give the ruling asked for by him. *Held*, that it was not open to the defendant to contend in this court that some but not all of the payments set out in the declaration were payments made in cash sales.

Where an insolvent person purchases goods from one who knows of his insolvency and gives therefor checks dated ten days ahead, which checks afterwards are paid, such purchases may be found to have been made not for cash, and the payments may be found to have been made in satisfaction of antecedent debts and to have been preferences within § 60, a, b, of the bankruptcy act of 1898 as amended in 1903.

CONTRACT by the trustee in bankruptcy of one James Saltman to recover, under § 60, a, b, of the bankruptcy act of 1898 as amended in 1903, twenty payments alleged to have been unlawful preferences amounting to \$1,614.89, made by Saltman to the defendant, a creditor. Writ dated October 9, 1908.

In the Superior Court the case was tried before *Hardy, J.* There was evidence tending to show that Saltman had been an overall manufacturer in Cambridge for seventeen years, that his wife was the defendant's first cousin, that he once had worked for the defendant and in all had known him for about twenty-two years, during which time he had bought goods of him on credit on which he made payments on account; that at various times he had owed the defendant considerable money, on March 19, 1907, owing him \$2,542; that he had paid other persons interest as high as eighteen per cent per year; that at the time of the trial he was in business with a relation of the defendant; and that he had filed a voluntary petition in bankruptcy on July 17,

1908, in which he made affidavit that his liabilities amounted to \$7,002.83 and his assets to \$315.

Saltman, who was called as a witness by the plaintiff, testified with reluctance that he had been unable to pay his debts on January 17 and March 17, 1908; that during the six months preceding July 17, 1908, he had had no conversation with the defendant in regard to his financial condition; that on March 14, 1908, he had a conversation with the defendant in his office; that the defendant's bookkeeper used to put sales to and payments by him in a "little book" of Saltman's; that on March 14, 1908, he owed \$1,962 to the defendant, who figured up that amount; that on that day the defendant made out twenty-six notes, covering the whole balance then due, payable from one to twenty-six months consecutively, for \$75 each plus interest at twelve per cent, except that the last note was for \$109, being \$87 plus interest, and said to Saltman that he just wanted to straighten out the account, "jumped on Saltman;" that Saltman asked him why the defendant was now starting in with notes, and the defendant said, "We want once for all to straighten out how much you owe him, and what goods you buy hereafter will be a different transaction;" that Saltman then signed the notes; that the giving of these notes was not in the usual course of business between him and the defendant; that it was the first time that the account between him and the defendant was put in the shape of notes; that before that the defendant used to charge the goods on bills and "it used to run right along;" that he had no agreement to give these notes before he went at that time to the defendant's place, and when going there he didn't know he was going to sign any notes; that the defendant said that he didn't want to let the account run the way it was; that the notes were made payable so that it would be easy for Saltman to pay; that defendant said it was "too much for him to keep track of the account in that little book;" that after March 14, 1908, at divers times, up to the assignment, he bought goods of the defendant, paying therefor with checks dated ahead ten days, the defendant sending him the goods and he sending the defendant the check so dated ahead, all of which checks were paid except the last one or two; that he had been in the defendant's place between March 14 and July 17, 1908, sometimes two or three times a

week and had talked with the defendant perhaps forty times, but that during all these conversations he could not remember whether or not he talked about his financial condition; that between March 17 and July 17, 1908, he had paid the defendant \$1,538.39 in checks, including three checks with which he paid three of the notes given on March 14; that his bank balances on June 1 and July 1, 1908, respectively, were \$143.60 and \$18.16.

At the close of the evidence, the defendant asked the presiding judge to rule "that the evidence was insufficient to justify a verdict for the plaintiff." The ruling was refused. The jury found for the plaintiff in the sum of \$560.89; and the defendant alleged exceptions.

E. Greenhood, for the defendant.

T. R. Bateman, (*H. W. Brown* with him,) for the plaintiff.

SHELDON, J. The evidence was very meagre, but in our opinion it presented a question for the jury. They could find that Saltman was insolvent on and before March 14, 1908, and remained so until he went into bankruptcy four months and three days later. From the very character of the transaction between the defendant and Saltman, the giving of the notes bearing the rate of interest and coming due at the dates fixed, and the arrangement that Saltman should still buy goods of the defendant and pay for them either in cash or by checks to be dated some days ahead and then to be collected in regular course, in connection with what could be found to be the desperate condition of Saltman's finances, the jury could infer not only that Saltman intended to prefer and did prefer the defendant, but that the defendant had reasonable cause to believe and actually did believe that Saltman intended thereby to give him a preference. Three of these notes were paid as they respectively came due. Certainly the jury could find that these payments constituted preferences, that Saltman so intended, and that the defendant had reasonable cause to believe this. That entitled the plaintiff to go to the jury. *Purinton v. Chamberlin*, 131 Mass. 589, 590. *Killam v. Peirce*, 153 Mass. 502. *Chipman v. McClellan*, 159 Mass. 368. *Jaquith v. Winnisimmet National Bank*, 182 Mass. 53. *Atherton v. Emerson*, 199 Mass. 199, 211. *Ridge Avenue Bank v. Studheim*, 145 Fed. Rep. 798.

The defendant's counsel has ingeniously argued that the pay-

ments made by Saltman for goods bought by him after the transaction of March could not be recovered as preferences, because they were really cash payments and so understood by the parties. But this point is not open to him; for his only exception was to the refusal of the judge to rule that the evidence was insufficient to justify a verdict for the plaintiff, that is, a verdict for any amount. Moreover, the jury could find that these payments were made, not when the goods were bought and the checks dated ahead were given, but only when the days of their dates were respectively reached and they were paid. In that event, the purchases were not made for cash, and the payments were really payments of a precedent debt. *In re Lyon*, 121 Fed. Rep. 723.

Exceptions overruled.

WILLIAM J. AHERN vs. BOSTON ELEVATED RAILWAY
COMPANY.

Suffolk. November 13, 14, 1911. — January 8, 1912.

Present: RUGG, C. J., HAMMOND, SHELDON, & DECOURCY, JJ.

Negligence, Street railway. Police. Practice, Civil, Conduct of trial: requests and instructions, Exceptions.

At the trial of an action of tort by a police officer against a street railway company, there was evidence tending to show that, while the plaintiff in the exercise of due care and in the performance of his duties was standing at the intersection of two streets which crossed each other at right angles and upon each of which were double tracks of the defendant with switches connecting with the tracks upon the other street, a closed vestibuled street car of the defendant was managed by its employees so negligently that for his own safety he was compelled to step upon the left hand front step of the car, from which position he tried to get into the car but was prevented from doing so because the vestibule door was closed and the motorman disregarded his signals to be let in although he saw him there, and that the car then was driven around a switch at so excessive and dangerous a rate of speed that it came into collision with another car going around an opposite switch, the step upon which the plaintiff stood was broken and he was thrown to the ground. *Held*, that a verdict could not have been ordered for the defendant, and that it could not be said as a matter of law that the plaintiff by getting upon the car step assumed the risk of the injury which happened, because there was evidence that he was compelled to do so by circumstances caused by negligence of the defendant's employees.

A police officer, charged with the regulation of traffic in a city at a crossing of streets where street cars and other vehicles pass, in order faithfully to perform his whole duty, may find himself compelled to get upon a step of a car where he may be exposed to injury and where passengers are not invited or expected to stand.

Where, at the trial of an action of tort against a street railway company for personal injuries, the defendant asked the presiding judge to rule that "all that the defendant is required to do with regard to a trespasser, is to abstain from wilfully, wantonly or recklessly exposing him to danger," and that there was "no evidence warranting a finding that the defendant was guilty of wilful, wanton or reckless negligence," and the presiding judge refused so to rule but instructed the jury that under the circumstances shown in the evidence they could not find for the plaintiff unless they found that he was in the exercise of due care and, having been compelled to be in a certain place by reason of negligence of the defendant's employees, was then injured by reason of further negligence on their part, exceptions by the defendant to the refusals so to rule must be overruled.

Where in an action at law a defendant's bill of exceptions shows that the only exceptions taken by him at the trial were to refusals of the presiding judge to make certain rulings which he asked for, possible errors in the charge to the jury cannot be considered.

TORT by a police officer, for personal injuries alleged to have been sustained by the plaintiff, who, while performing his duties at the corner of Cambridge Street and Charles Street in Boston, was compelled by negligence of employees of the defendant to get upon the step of a street car of the defendant, where he received the injuries complained of when the car through further negligence of the defendant's employees was caused to run into another street car. Writ dated October 30, 1907.

In the Superior Court the case was tried before *Bond, J.* There were double tracks of the defendant upon Charles Street which intersected at right angles double tracks on Cambridge Street, and there were switches which allowed cars to pass to and fro between the Charles Street and the Cambridge Street tracks. Other material facts are stated in the opinion. At the close of the evidence the defendant asked for the following instructions:

"(1) Upon all the evidence your verdict must be for the defendant upon all counts of the plaintiff's declaration.

"(2) Upon all the evidence the plaintiff is not entitled to recover."

"(6) Upon the fourth count of the plaintiff's declaration your verdict must be for the defendant."

"(9) The plaintiff getting upon the left hand front step of the car assumed the risk of any injury that might happen to him

while he was in that position, and cannot recover for such injury."

"(12) The plaintiff was not in the exercise of due care, if, as he stood in the street, he relied wholly upon others to see that he was not struck by a City Point car.

"(13) The evidence does not warrant a finding that the plaintiff was in the exercise of due care.

"(14) One who is injured by reason of his having assumed a dangerous position, cannot justify his act in getting into such position by showing that he did so to escape from other danger, unless he shows affirmatively that his getting into the other danger was not due to his failure to exercise ordinary care for his own safety.

"(15) The evidence does not warrant a finding that the plaintiff was justified in getting upon the left hand front step of the car.

"(16) The evidence does not warrant a finding that the plaintiff was justified in remaining upon the car of the defendant until he was struck.

"(17) A person getting upon the left hand front step of a closed street car, with a vestibule platform and the left hand door to the front vestibule closed, while the car is operating along double tracks, is a trespasser upon the car.

"(18) A police officer or patrolman has no more right than any private person to get upon a part of the car where he may be exposed to injury and where passengers are not invited or expected to ride.

"(19) The plaintiff in this case was a trespasser upon the car of the defendant.

"(20) All that the defendant is required to do with regard to a trespasser, is to abstain from wilfully, wantonly or recklessly exposing him to danger.

"(21) The defendant and its servants owed the plaintiff no duty, except to abstain from wilfully, wantonly or recklessly exposing him to danger.

"(22) There is no evidence warranting a finding that the defendant was guilty of wilful, wanton or reckless negligence."

The instructions were refused. The jury found for the plaintiff in the sum of \$2,000; and the defendant alleged ex-

ceptions, which, after the death of *Bond, J.*, were allowed by *Hitchcock, J.*

A. A. Ballantine, for the defendant.

A. T. Smith, for the plaintiff.

SHELDON, J. The jury could find that the plaintiff while in the exercise of his duty in regulating the movement of cars and of other vehicles at the corner of Charles and Cambridge streets, and while himself in the exercise of due care, standing at a place where at that time and under those circumstances he had a right to be, was approached by a car of the defendant driven in a manner which at that time and place could be found to have been negligent, and by reason of which he was obliged for his own safety to get upon the front step of the car; that this car then, going around the switch at an excessive and dangerous rate of speed, came by reason of this negligence in contact with another car going around the opposite switch, so as to break the step on which the plaintiff was standing and throw him to the ground. The defendant's motorman who was operating the car was, according to his own testimony, aware of the plaintiff's presence upon the step and saw the other car approaching the switch; there seems to have been no dispute, certainly there was evidence, that the plaintiff could not get upon the platform of the car or higher up than the step on which he was standing, because the vestibule door was closed; and it could have been found that the motorman ought to have seen that there was immediate risk of a collision, but disregarded the signals of the plaintiff to open the vestibule door. No doubt other findings might have been made; and it may be that a verdict for the defendant reasonably could have been expected. But it is plain that a verdict for the defendant could not have been ordered.

As it could be found that it was by reason of the original negligence of the defendant's motorman that the plaintiff was compelled to take his position on the car step and to remain there until the collision, it could not be said as matter of law, whatever the jury might have found, that he assumed the risks of his position. The jury could say that he was not there of his own choice. It follows that the defendant's first, second, sixth, ninth, thirteenth, fifteenth, sixteenth, seventeenth, nineteenth and twenty-first requests were rightly refused.

The twelfth and fourteenth requests were given in substance.

The eighteenth request could not be given as framed. A police officer charged with the duty which was imposed upon the plaintiff might very probably, in order to perform faithfully his whole duty, find himself compelled to get upon a part of a car where he might be exposed to injury and where passengers are not invited or expected to ride. This was claimed to be the case here, and it presented a question of fact for the jury.

As to the twentieth request, the jury were instructed that the plaintiff could not recover unless he was in the exercise of due care, and in substance that this would not be so unless his getting upon the step of the car was for the reason and under the necessity that he claimed. This was more favorable to the defendant than the instruction we are considering, and so the defendant has as to this no ground of complaint. For like reasons, it cannot complain of the failure to give its twenty-second request. As the case was left to the jury, nothing more than ordinary negligence on its part needed to be proved.

As the defendant's exceptions were merely to the refusal to give its requests, we need not consider whether everything which the judge said to the jury was technically correct.

Exceptions overruled.



MARION F. CALLAHAN vs. ELIZA B. DICKSON.

Middlesex. November 14, 1911. — January 3, 1912.

Present: RUGG, C. J., HAMMOND, SHELDON, & DeCOURCY, JJ.

Landlord and Tenant. Negligence, Of one owning or controlling real estate, Plaintiff's knowledge of defect.

In an action by a girl about nine years of age when injured, who was living with her father in a tenement hired by him from the defendant, for personal injuries caused by a defect in a plank walk at the side of a passageway leading from the house containing the tenement to a highway, if there is evidence that the defendant let the tenement to the plaintiff's father with the right to use the passageway as the only approach to it, that the passageway remained in the sole control and charge of the defendant, that at the time of the letting the plank walk was in good condition, that the defendant recognized the duty of keeping it in the same

condition and caused some repairs to be made upon it or a new walk to be laid either before or after the letting, and that after the letting the defendant allowed the walk to become defective and dangerous in such a way as to cause the plaintiff's injury, the question of the defendant's negligence is for the jury.

In an action by a girl about nine years of age when injured, who was living with her father in a tenement hired by him from the defendant, for personal injuries caused by the plaintiff's foot catching in a hole in a plank walk at the side of a passageway, which was maintained by the defendant as the only approach to the house containing the tenement and was in the defendant's charge and control, where there is evidence of the defendant's negligence in failing to maintain the walk in as good condition as it was in at the time the tenement was let to the plaintiff's father, if it appears that the hole "was about six inches wide and about the same in length" and the plaintiff has testified that she "had noticed the hole before pretty nearly every day for a month and a half," and there also is evidence, that the accident happened at about seven o'clock on an evening early in August, when it was pretty dark, that the plaintiff had had trouble with her eyes and was wearing glasses, and that when she tripped in the hole she was with her father going to see the fire engines go by, the plaintiff's previous knowledge of the defect, although it is a circumstance to be considered by the jury upon the question of her due care, is not conclusive against her upon that issue, and the question whether with reference to all the circumstances the plaintiff was in the exercise of reasonable care is for the jury.

TORT by a girl, about nine years of age when injured, for personal injuries alleged to have been sustained on August 4, 1907, by reason of the plaintiff's foot being caught in a hole in a plank or board walk leading from the tenement hired from the defendant by the plaintiff's father, when the plaintiff was in the company of her father and was in the exercise of due care. Writ dated September 23, 1907.

The answer was a general denial.

In the Superior Court the case was tried before *Schofield, J.* The following facts, among others, appeared at the trial.

The defendant was the owner of four double-tenement houses at the end of a private way known as Union Place, leading from Union Street, a public way of the city of Cambridge. The defendant also owned the fee in such private way, a strip of land sixteen feet wide, for a distance of sixty-five feet from the junction of Union Street and Union Place. The adjoining houses on either side faced on Union Street and did not open on this alley or way. At the distance of sixty-five feet from the street the defendant's land widened out to one hundred feet. The plaintiff's father lived in one of the houses at the end of Union Place and on the line of one side of it. This private way was the only passageway from the houses to Union Street.

There was evidence that, about a year before the accident, the defendant had built new walks on each side of the way, composed of three two-inch planks, each eight inches wide, laid longitudinally. The accident occurred on Union Place, half way between the houses at the end of Union Place and Union Street, on August 4, 1907, at about seven o'clock in the evening. The plaintiff lived with her father.

The following stipulation, signed by the attorney for the defendant and the attorney for the plaintiff, was filed in the case: "In the above entitled cause, it is admitted that the premises described in the declaration were owned by the defendant as alleged and were rented to the plaintiff's father by the defendant's agent, as alleged in the declaration. It is also agreed that the walk described in the declaration was under the control of the defendant."

The plaintiff, among other matters, testified as follows: "At the time I was hurt I had been living at No. 4 Union Place about one and one-half years. I had had trouble with my eyes. I went to the eye and ear hospital that year, I think, and was wearing glasses at that time, I think. I could not see very well without glasses. I could see pretty well with them. I had my glasses on at the time I was hurt. It was about seven o'clock that I was hurt on that Sunday. I was going out in the street to see the fire. There were two families living in each house, and two houses on each side of Union Place. There was a driveway between the houses and the street, with walks on both sides. I was going to the fire and I tripped with I do not know which foot, but I tripped and fell and sprained my hand. I was going out to the fire, and I was walking along and I did not see the hole, and I caught my foot in the hole and tripped. The hole was on the boards and on the inside, in the plank walk in Union Place. It was kind of dark, pretty near dark. I had noticed the hole before pretty nearly every day for a month and a half, and I might have noticed it further back than that. I do not know whether I had seen it before that or not. There was a lot of holes in both sides of the boards. There were two boards about six inches long on each side, and there was quite a lot of holes from the street in."

Upon cross-examination, the plaintiff testified, among other

things, that the piece that was gone from the plank walk at the place where she tripped was about six inches wide, that her father was with her when she tripped, that they were going to see the fire engines go by and that Union Place was the only way of getting from the tenement to the street.

The plaintiff's father testified, among other things, that at the time of the accident he was living at 4 Union Place, Cambridge, that Union Place was the sole means of access to the house in which his tenement was, that he had moved into the house about a year and a half before the accident, that the plank walk was about twelve or fourteen inches wide, that when he moved into the house "this board walk was in pretty good condition," that after the witness had moved there the condition of the walk became defective, and that there was a hole "about six inches wide, right in the middle of the walk," that the hole "was about six inches wide and about the same in length."

On his cross-examination, the plaintiff's father, among other things, testified as follows: "My intention was to go to the end of Union Place and see the engines passing. I started from the steps as soon as I heard the first sound of the alarm, that is, as soon as I found out what box it was. I did not run. I started to walk. I was not in any hurry. I walked leisurely. I walked slow, so that the little girl had no trouble in keeping up with me. I had hold of her hand. I did not pull her. I was on the outside of the walk. . . . I cannot say whether I had hold of my little girl's arm or not at the time of the accident, or whether she had hold of my coat. I might have been several feet ahead of her, and I cannot say whether I was some ways ahead of her. What attracted my attention to her was that she screamed when she fell. I turned round and picked her up."

At the close of the evidence the defendant asked the judge to make the following rulings:

"4. The defendant was not obliged to keep the private way in repair, except opposite plaintiff's house.

"5. If plaintiff knew that there were holes in the plank walk, it was her duty to avoid them, and if she continued to use said walk, she was not using due care, and she cannot recover.

"6. It does not appear from the evidence that the plaintiff

was in the exercise of due care, and for that reason the plaintiff cannot recover.

" 7. If the alleged defect in the plank walk had existed for a month and a half, it was an obvious risk which the plaintiff assumed, and she cannot recover."

" 9. On all the evidence, the plaintiff cannot recover, and the verdict should be for defendant."

The judge refused to make these rulings, except so far as the seventh was given in a supplementary charge. A part of such supplementary charge was as follows : "The tenant at the time of the letting takes the risk of such defects as that [described in the plaintiff's evidence], namely, defects which are obvious, which would be noticeable and seen by a person of ordinary prudence and vigilance in examining the property. The members of his family would take the property under the same conditions under which he took it at the time of the letting, and subject to the same obvious risks ; but if the walk was not in that defective condition at that time, and afterwards became defective, then neither the tenant nor the members of his family take the risk of such defects, so that they are not barred from recovering damages against the landlord simply by the fact that they know the defects exist."

After other instructions the judge concluded as follows : "But if the plaintiff proves the case upon the ground which I have stated, and the duty was imposed upon the landlord from the existence of that tenancy to use reasonable care to keep this walk in the condition in which I have stated, and it became defective, and the defects were known, the duty on the part of the plaintiff is to use reasonable care with reference to all the circumstances. It cannot be said as a matter of law, that the existence of an obvious defect under these conditions, and knowledge of it by the plaintiff, of themselves defeat her action. It is a question for the jury whether she used reasonable care."

The jury returned a verdict for the plaintiff in the sum of \$50 ; and the defendant alleged exceptions.

H. S. Riley, for the defendant.

A. L. Richards, for the plaintiff.

SHELDON, J. The jury could find that the defendant leased the tenement on Union Place to the plaintiff's father, with the

right to use that passageway as the sole approach to and from the tenement, that the passageway remained in the sole control and charge of the defendant, and that she assumed the duty of keeping it and the board walk which ran through it in as good condition for the use of the father and his family as at the time of the letting. *Faxon v. Butler*, 206 Mass. 500. *Miles v. Janvrin*, 200 Mass. 514. *Domenicis v. Fleisher*, 195 Mass. 281. *Andrews v. Williamson*, 193 Mass. 92. *Leydecker v. Brintnall*, 158 Mass. 292. There was also evidence that the defendant recognized this duty (*Nash v. Webber*, 204 Mass. 419, 425), and caused some repairs to be made on the walk or a new walk to be laid down, whether before or after the letting to the plaintiff's father may not be wholly clear on the evidence. There was evidence also that since the letting the walk was allowed to become defective and dangerous, in such a manner as to warrant an inference of negligence on the part of the defendant.

And there was evidence of due care on the part of the plaintiff. Her previous knowledge of the defect was a circumstance to be considered, but it was not conclusive against her as matter of law, though the jury might have found it to be so in fact. *Page v. Weymouth*, 207 Mass. 325. *Frost v. McCarthy*, 200 Mass. 445, 448. For the same reasons it could not be ruled that she had assumed the risk of injury from the defect even if this defense was open under the answer.

It follows that each one of the defendant's requests was rightly refused.

A different question would have been presented if it had appeared that this passageway, though a private way, had been wrought into the similitude of a public street, and if there had not been evidence that the defendant had assumed a duty in regard to it. We express no opinion upon such a question.

Exceptions overruled.

JOSEPH MILLEN vs. HENRY BIGELOW WILLIAMS.

Suffolk. November 16, 1911. — January 3, 1912.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DECOURCY, JJ.

Order. Compromise. Account Stated.

In an action upon an order in writing drawn by a contractor, called the M. Company, for the payment of \$500 and alleged to have been accepted by the defendant, it appeared that the defendant accepted the order in the following terms: "The above order is accepted by me, payable only out of such sums as upon a final accounting between the M. Company and myself shall be found due the M. Company . . . [under a contract named]. By accepting this order, I do not admit in any way that there is anything due or payable or that there will be anything due the M. Company." Thereafter a settlement was made between the defendant and the M. Company by which the defendant paid to the M. Company a sum of more than \$6,000, and received from the M. Company a release. Before the settlement there were pending an action of contract by the M. Company against the defendant for about \$28,000, a petition by the M. Company to enforce a mechanic's lien for the same amount against the defendant, and an action by the defendant against the M. Company to recover \$40,000 for breach of the contract named in the order. At the time of the settlement, in the action of contract brought by the M. Company an entry was made of judgment for the defendant, on the M. Company's petition an entry was made of petition dismissed, and the action by the defendant was discontinued, all without costs and all by agreement of the parties. Evidence was admitted, against the defendant's objection, of the negotiations between the counsel for the M. Company and the counsel for the defendant which resulted in the settlement. A letter of the defendant's counsel stating his requirements for the settlement and also the release given by the M. Company to the defendant were admitted in evidence against the defendant's objection. On the evidence it could have been found that the payment by the defendant to the M. Company of the sum of more than \$6,000 was not made as the payment of a balance agreed to be due or because the defendant admitted any liability whatever, but merely as a compromise for the sake of ending the three suits pending between the parties to the settlement in which much larger amounts were involved, and in that case there was no evidence of any final accounting between the defendant and the M. Company. But it also could have been found on the evidence that the transaction was something more than a compromise, and that there was an accounting between the parties to the settlement, who had unliquidated demands against each other none the less different because they grew out of the same contract. A verdict was ordered for the defendant. *Held*, that the case should have been submitted to the jury to pass upon the question of fact, whether the payment was the result of a final accounting between the M. Company and the defendant, which would fulfil the condition of the order.

CONTRACT on an order in writing for the payment of \$500, accepted by the defendant in writing in the terms printed below.

Writ in the Municipal Court of the City of Boston dated November 9, 1909.

On appeal to the Superior Court the case was tried before Aiken, C. J. It appeared that the plaintiff did business under the name "Cambridge Architectural Iron Works." The order sued upon was as follows:

"Boston, April 2, 1907.

"H. B. Williams, Esq., 201 Clarendon Street, Boston, Mass.

"Dear Sir: — Please pay to the order of Cambridge Architectural Iron Works the sum of five hundred (500) dollars on account of their contracts with us for work at the Kensington Building, and charge the same to our account with you.

"Yours truly, The Morrison Company, By W. L. Morrison."

The defendant accepted this order on April 5, 1907, in these terms:

"The above order is accepted by me, payable only out of such sums as upon a final accounting between the Morrison Company and myself shall be found due the Morrison Company on account of alterations and repairs on the Kensington, under contract dated June 8, 1906. By accepting this order, I do not admit in any way that there is anything due or payable or that there will be anything due the Morrison Company."

The execution of the order and of the acceptance was admitted.

It appeared in evidence, that the defendant was the owner of the building at the corner of Boylston and Exeter Streets, in Boston, known as the Kensington Building; that on or about June 8, 1906, he entered into a contract in writing with the Morrison Company, to remodel the building; and that on or about August 14, 1906, and at divers other times since that date, the Morrison Company entered into contracts with the plaintiff by which the plaintiff was to furnish and did furnish certain iron work in the alteration of the building.

The plaintiff put in evidence the records of three cases in the Superior Court, begun in July, 1907, as follows: 1. An action of contract by the Morrison Company against Williams, the present defendant, the *ad damnum* being \$35,000 and the declaration setting forth a claim for \$28,149.45 for work and material furnished under the contract of June 8, 1906; 2. A petition to en-

force a mechanics' lien, filed by the Morrison Company against Williams, setting forth a claim for the same amount as claimed in the action at law; and, 3. An action at law, by Williams against the Morrison Company, to recover \$40,000 for breach of the contract of June 8, 1906.

It appeared from the records in these three cases that on October 20, 1909, in the first of the above actions, entry was made of judgment for the defendant, without costs; that in the second action entry was made of petition dismissed without costs, and that the third action was discontinued without costs, all by agreement of the parties.

The plaintiff called as a witness Mr. Stoneman, who was the counsel of record for the Morrison Company in the three cases mentioned above. He testified that he had interviews and correspondence with Mr. Sturgis, who was the counsel for the present defendant, in regard to a settlement of the cases. Against the objection and subject to the exception of the defendant the witness testified to the substance of his conversations with Mr. Sturgis.

Subject to the defendant's exception, the witness further testified that the amount agreed upon between Mr. Sturgis and the witness in settlement was \$6,750; that that sum was paid to him as attorney for the Morrison Company; that in return he complied with the terms of the settlement as stated in a certain letter from Mr. Sturgis; and that a release was executed and was given to the present defendant. The release and the letter from Mr. Sturgis were admitted in evidence subject to the defendant's exception.

The findings warranted by the evidence, in regard to the character of the negotiations between the counsel for the Morrison Company and the counsel for the present defendant and the character of the settlement in which the negotiations resulted, are stated in the opinion.

At the request of the defendant the Chief Justice ruled that upon all the evidence the plaintiff could not recover and ordered a verdict for the defendant. At the request of the plaintiff he reported the case for determination by this court. If the ruling was wrong and there was any evidence to be submitted to the jury, and the case should have been submitted to them, judg-

ment was to be entered for the plaintiff in the sum of \$500 with interest at the rate of six per cent from the date of the writ; otherwise, judgment was to be entered on the verdict for the defendant.

A. Berenson, for the plaintiff.

R. F. Sturgis, for the defendant.

SHELDON, J. Undoubtedly the jury might have found that in what took place between the defendant and the Morrison Company the defendant simply bought his peace in the controversies which had arisen between them. It could be found that he paid the sum of more than \$6,000 to the company, not because that was the amount which it was finally agreed that he ought to pay as the balance due upon the collation and comparison of their various claims growing out of the contract between them and the work that had been done thereunder, and not because he admitted that he was liable for any sum whatever, but merely because he consented to pay that sum for the sake of ending the three suits which were pending between them and in which much larger amounts were involved. If this was so, there was no evidence of any final accounting between the defendant and the Morrison Company or that any amount had become due from him under their contract; and as the conditions of the defendant's acceptance would not have been performed, of course the present action could not be maintained. The defendant is right in contending that his payment to the company would not then be an admission or estoppel on his part, upon which this action could be maintained.

But the jury also could have found that the transaction was something more than a compromise between the parties. They could have found that it was an accounting between two parties having unliquidated demands against each other, none the less different because they grew out of the same contract. *Alvord v. Marsh*, 12 Allen, 603, 606. In the negotiations which led to the adjustment, the demands of each party and the possible defenses against them were discussed between the representatives of the parties. There were stipulations as to what was to be included in the settlement. The admission of much of the testimony was excepted to by the defendant; but those exceptions have not been argued, and we treat them as waived. Nor do

we see any ground upon which this evidence could have been excluded. The issue was, what was the transaction between these parties, judging their intention as it was manifested at the time. The intention and understanding of the defendant were especially material. But this was a question of fact, to be settled by the jury. That was the point of the decision in *Colburn v. Groton*, 68 N. H. 151, 156, cited by the defendant. If, after the defendant and the Morrison Company had reached their agreement, he had refused to pay the sum decided upon, and the company had sued him upon an account stated to recover that sum, the issue thus presented would have been for the jury.

No question has been made as to the authority of the attorneys of the defendant and of the Morrison Company to act for and to bind their respective principals.

The case should have been submitted to the jury. See *Buttrick Lumber Co. v. Collins*, 202 Mass. 413; *Allen v. Mayers*, 184 Mass. 486, 488; *Buxton v. Edwards*, 184 Mass. 567; *Chace v. Trafford*, 116 Mass. 529, 533.

The point that this order was not an inland bill of exchange and ought not to have been declared on as such, was not taken at the trial and is not now open. The ruling was not made upon the pleadings, but upon the broad question whether there was any evidence upon which the defendant could be held.

Upon the report, judgment must be entered for the plaintiff for \$500 with interest from the date of the writ.

So ordered.

DANIEL L. BARRY & another vs. ISAAC F. WOODBURY.

Suffolk. November 17, 1911. — January 8, 1912.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DECOURCY, JJ.

Pleading, Civil, Variance.

The remark at the end of the opinion of this court in *Barry v. Woodbury*, 205 Mass. 592, 598, that "the case of which there was evidence . . . was substantially within the 'four quarters' of the fourth count" of the declaration, "although there imperfectly stated," was not a decision nor an intimation that the case shown by the evidence was not also stated in substance in the second count, and, after a new trial, it here was decided that as against the defendant the variations between the second and the fourth counts and between those counts and the findings which were warranted by the evidence were immaterial.

CONTRACT OR TORT with a declaration, as amended, in four counts. Writ dated March 21, 1906.

In the Superior Court the case first was tried before *Bond, J.*, who ruled that on all the evidence the plaintiffs could not recover and ordered a verdict for the defendant. Exceptions alleged by the plaintiffs were sustained by this court in a decision reported in 205 Mass. 592.

There was a new trial before *Sanderson, J.* At the close of the evidence the plaintiffs waived the first and the third counts of the declaration and went to the jury on the second and fourth counts. Those counts were as follows:

"Second Count: And the plaintiff says that on or about October 23, 1902, he and the defendant entered into a contract by the terms of which the defendant agreed that if the plaintiff would let certain property of the plaintiff, to wit: one engine, one boiler, one large scales and one piece of smoke-stack remain in the Watertown Rubber Factory so called and be sold by the defendant with said factory that the defendant would within a reasonable time after such sale pay the plaintiff a reasonable sum for said property of the plaintiff; that the plaintiff in accordance with said agreement permitted said property of his to remain in said factory and to be sold by the defendant with said factory; and although the defendant has sold said factory with the said property of the plaintiff and although a reasonable time has elapsed since said sale, and although due demand has been made

on the defendant, the latter refuses and neglects to pay the plaintiff a reasonable sum for the aforesaid property of the plaintiff sold as aforesaid by the defendant."

"Count 4. In contract. The plaintiffs say that on or about October 23, 1902, they bought of the defendant the right to detach and carry away as their own personal property certain fixtures attached to real estate in Watertown aforesaid, a schedule of which is attached thereto marked 'A. And the defendant after said purchase requested the plaintiffs not at once to detach or remove said fixtures, but to leave them upon the premises for the time being or until he had an opportunity to sell said real estate and promised the plaintiffs that if they complied with said request he would pay them a fair and reasonable price for said fixtures. And the plaintiffs thereupon did comply with said request and left said fixtures attached to said real estate. And the defendant thereafterwards permitted said real estate including said fixtures to be sold for unpaid taxes, neglected to exercise his right of redemption from said sale, but on the contrary released and conveyed to the holder of said tax title his right of redemption, whereby the purchaser of said tax title, one H. C. Grant, became the owner of said fixtures. Wherefore the plaintiffs say the defendant owes them an amount equal to the fair value of said fixtures."

The schedule, referred to as attached to the fourth count, contained four items, as follows: "75 H. P. Fitchburg Engine," "Fitchburg Boiler 60 H. P.," "Large Scales" and "Piece of Smoke Stack."

The first, fourth and sixth of the defendant's first series of rulings requested, referred to in the opinion, were as follows:

"1. Under the decision of the Supreme Court in this case, 205 Mass. 592, the fourth count is the only count upon which the plaintiff is entitled to go to the jury."

"4. Upon all the evidence the plaintiff is not entitled to recover on the second count."

"6. Upon all the evidence the plaintiff is not entitled to recover on the fourth count."

The judge refused to make any of these rulings.

The sixth of the defendant's second series of rulings requested, referred to in the opinion, was as follows:

"6. The plaintiff cannot recover unless the jury find

"1st. That either or both the Erie boiler and Fitchburg engine were included in the sale of October 23, 1902; and

"2nd. That from the time of the sale in October, 1902, was not an unreasonable time in which to remove same; and

"3rd. That the defendant promised in October, 1903, that if the plaintiff would not remove them that he would pay a reasonable price therefor when he sold the real estate; and

"4th. That the quitclaim deed by the defendant to Grant was a sale of the real estate within the meaning of that promise."

The manner in which this ruling was made by the judge is described in the opinion.

The jury returned a verdict for the plaintiffs in the sum of \$897.75; and the defendant alleged exceptions.

V. J. Loring, (J. H. McDonough with him,) for the defendant.
J. E. Hannigan, for the plaintiffs.

SHELDON, J. The defendant's first contention is that under the decision of this case reported in 205 Mass. 592, the plaintiffs could go to the jury only on the fourth count of their declaration. This contention is based upon the last sentence of the opinion then rendered, that "the case of which there was evidence . . . was substantially within the 'four quarters' of the fourth count, although there imperfectly stated." But there was neither decision nor intimation that the case made out was not also within the "four quarters" of the second count, although there perhaps a little more imperfectly stated. In our opinion, as against the defendant who had taken upon himself to sell this machinery and who had himself no right to prevent the plaintiffs from severing and removing it, the variations between the second and fourth counts, or between those counts and the findings which were justified upon the evidence, were not material. Under the former decision the plaintiffs were entitled to go to the jury on both counts. *Barry v. Woodbury, ubi supra. Butterworth v. Western Assurance Co.* 182 Mass. 489. It follows that the first, fourth and sixth of what may be called the defendant's first series of requests were properly refused.

The sixth request of his second series appears to have been given, with appropriate explanations. The judge did not rule as matter of law that the defendant's quitclaim deed to Grant

was a sale of the real estate, as the defendant seems to have understood. He stated and gave the fourth clause of the sixth request immediately following the statement of the third clause thereof. This was made plain when the judge immediately added, by way of a summary, that "to entitle the plaintiff to a verdict the jury must find" the other requisites claimed by the defendant "and that the quitclaim deed of the defendant to Grant was a sale of the real estate within the meaning of" the defendant's promise. The other instructions upon this subject were unexceptionable. The seventh, eighth and ninth requests were given. They are included in what has been said of the sixth request.

We have examined all the exceptions that were saved at the trial, and find no material error.

Exceptions overruled.

WALTER C. TOWNSEND vs. SULLIVAN NILES.

SULLIVAN NILES vs. WALTER C. TOWNSEND & others.

Middlesex. November 17, 20, 1911. — January 8, 1912.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DeCOURCY, JJ.

Practice, Civil. Question for jury, Judge's charge, Exceptions. Deceit. Sale. Damages, Recoupment.

In an action to recover damages for an alleged false and fraudulent representation of the defendant, whereby it was alleged that the plaintiff was induced to buy a share in a provision business carried on by the defendant and another, it appeared that the defendant made the statement alleged to be fraudulent, but upon the question whether the defendant's representation or other considerations induced the plaintiff to purchase the share in the business the testimony of the plaintiff warranted a finding either way. The defendant alleged exceptions to a refusal of the presiding judge to rule that on all the evidence the plaintiff was not entitled to recover. No question was raised as to the judge's charge and it was not reported in the bill of exceptions. *Held*, that the question of fact upon the conflicting evidence properly was left to the jury and must be taken to have been submitted to them with full and correct instructions.

In an action to recover damages for an alleged false and fraudulent representation of the defendant, that the defendant and his partner, who carried on a retail and wholesale pork business in a stall in a general market and a storehouse on another street, were doing a business of \$150,000 a year, whereby it was alleged

that the plaintiff was induced to buy a share in the business, it cannot be said as matter of law that the fullest examination of a stall in a market or of other premises in which such a business at wholesale or retail was carried on would make manifest the truth or falsity of a representation as to the amount of business which was being done there, and, if it appears that the plaintiff was given a full opportunity to examine the stall and the warehouse and did examine them, this does not prevent his going to the jury on the question whether he was induced to buy the share in the business by the defendant's false and fraudulent statement.

The rule of *Poland v. Brownell*, 181 Mass. 188, that where goods are fully examined by a buyer he cannot hold the seller liable for "mere seller's statements," is not to be extended.

Two cases were tried together. The first was an action to recover damages for an alleged false and fraudulent representation of the defendant as to the profits of a business carried on by the defendant, whereby the plaintiff was induced to buy a share in the business. The second action was brought by the defendant in the first case against the plaintiff in that case on a promissory note given in part payment for the share in the business, and the only defense relied upon was that the making of the note was induced by the false and fraudulent representation as to the profits of the business which was alleged in the first case. There was evidence of a false and fraudulent representation made by the defendant in the first case which induced the plaintiff in that case to buy the share of the business in question. The jury in the first case returned a verdict for the plaintiff in the sum of \$4,500. The jury in the second case returned a verdict for the plaintiff in that case in the sum of about \$3,500. The defendant in the second case alleged exceptions to the admission in the second case of certain evidence upon the issue of the alleged false and fraudulent representation of the plaintiff set up in the defendant's answer. *Held*, that the defense of deceit, having been declared upon and recovered for in the first case, the damage to the defendant in the second case was made good by his recovery in the first case, and that he was entitled to no recoupment to be deducted from the amount of his note on account of a wrong for which he had been compensated in full, so that, even if the evidence was admitted improperly, the defendant in the second case could not be aggrieved by the error and would have no right of exception. It was not suggested that the effect of the evidence might have been to reduce the amount of the verdict in the first case, and no exception to its admission in that case was alleged.

TORT for alleged deceit in falsely and fraudulently representing to the plaintiff that the firm in which the defendant was a partner, who were engaged in a provision business, were doing a business of \$150,000 annually, whereby the plaintiff was induced to purchase a one third interest in such business. Writ dated April 9, 1908; and

CONTRACT, by the defendant in the first case against the plaintiff in that case, on two promissory notes respectively for \$2,000 and \$1,000, the respective indorsers of the notes also being made defendants. Writ dated March 2, 1908.

The answers in the second case set up that the principal defendant in that case was induced to make the notes sued upon by the same false and fraudulent representation alleged in the declaration in the first case, the notes having been given in renewal of notes given in part payment for the one third interest in the provision business purchased by the principal defendant.

In the Superior Court the cases were tried together before *Fox, J.* The following facts, among others, appeared in evidence.

The defendant in the first case, hereinafter called the defendant, and one Onthank, in March, 1906, were partners doing a retail and wholesale business in pork products in New Faneuil Hall Market in Boston under the firm name of Niles and Onthank. The defendant had been in the same business at the same stall in the market since 1863, first under his own name, later as a member of the firm of Niles Brothers, and still later under the firm name of Niles and Onthank. Early in 1906, the defendant being an elderly man, and his partner Onthank being sick, they sold a third interest in the business to the plaintiff in the first case, hereinafter called the plaintiff, under a plan of reorganization substantially as follows:

On February 12, 1906, the plaintiff, the defendant and Onthank agreed to form a corporation under the laws of Massachusetts, bearing the name of Niles and Onthank Provision Company, with a capital stock of \$24,000, to be paid for in cash.

"Pursuant to this agreement, on March 5, 1906, each of the parties named paid to the corporation \$8,000, and received in return therefor one third of the stock of the corporation, and the plaintiff began actively to participate in the conduct of the business. On March 10, 1906, the corporation paid the firm of Niles and Onthank \$10,000 for the stalls and the good will of the business, and also paid the firm the fair market value of its stock of goods on hand. On June 28, 1906, the corporation, having more money in the bank than it needed in the business, paid to each of the stockholders \$2,000 and correspondingly reduced its authorized capital. On July 8, 1906, Onthank died. On October 28, 1906, the plaintiff, being the owner of one third of the authorized capital stock, bought out the other two stockholders, namely, the defendant Niles and the estate of Onthank, paying to each the sum of \$42,000. On the same date, the defendant,

in behalf of the firm of Niles and Onthank, paid back into the treasury of the corporation \$1,228.28, representing a rebate of \$1,000 on the stalls and other items, thereby reducing the amount for which the stalls and good will were actually put into the corporation to \$9,000. The plaintiff then being the owner of all, or substantially all, of the outstanding stock of the corporation, the business continued until January, 1908, at a loss. On that date a creditor attached the property of the corporation and it was sold on mesne process. On April 9, 1908, this action was brought."

The plaintiff testified that he was forty-nine years old and had been in the grocery business in East Boston since 1880, about twenty-nine years altogether, twenty-three years continuously; "that he had no connection with Faneuil Hall Market until 1906; that in February, 1906, Niles and Onthank called him to see them and to consider going into business; that he met Niles in the office of one McKay, the superintendent of the markets; that the plaintiff, Onthank and Niles were present; that they asked him if he wanted to buy the business at Faneuil Hall Market and 100 Fulton Street, and, after talking a little with them, he went up to the market with them and refused them; that it did not look as though he wanted the business; that from the meeting place in superintendent McKay's office, in the Old Quincy Market building, they went up to the stall and there had a little talk; Onthank went into the office and Niles was out by the marble counter. The plaintiff questioned him there and asked him how much business they were doing yearly. 'Why,' he says, 'we are doing full \$150,000;' that the plaintiff did not talk much more; that it did not appear like it at all to him, and that is why he refused to buy the business; that a price of \$10,000 at that time was put just upon the stall, just the stall, no stock mentioned, the bonus as it is called; that the firm had two places of business, a stall and a half in the New Faneuil Hall Market and a storehouse at 100 Fulton Street; that he did not at that time inspect the storehouse; that they sent for him a second time through superintendent McKay, and he met them at the same place and they went up into Faneuil Hall and talked the matter over; that they asked him if he wanted to go into the business, and he told them that it was no

use, that he did not care for the business; that the defendant said they were doing a good business; that Onthank was sick and a little run down from overwork and he was going out to take care of the wholesale business, as he had for so many years; and that he, the plaintiff, should stay there and improve the stock, that is, in forming a stock company; that they told him what a prosperous business it was on that second interview; that the defendant said the plaintiff would have a prosperous business and that they had made so much money there; that at the time of the second meeting the plaintiff had gone down to Fulton Street to see what was in there; that it was just a store, and one of the worst looking places he ever saw for a store; that the plaintiff refused them, but they asked him to meet them again, and he met them a third time at the directors' room of the Fruit and Produce Exchange; that then a scheme was produced for a stock company; that they tried to impress upon the plaintiff that if he would buy the business, Onthank would stay there and work with him, but he told them it was useless and he could not think of it; that they had it all figured up what to do and form a stock company and have the plaintiff a third owner, and the capital stock of \$24,000."

The plaintiff further testified as follows: "Q. And whether or not figures were mentioned at that meeting? A. Yes, sir, the second meeting, yes, sir, that was talked over — \$150,000, a prosperous business I should have, I go right into the business, money-making business. . . . I asked the question, I says, 'What do you want of \$24,000 capital stock; and carrying no more stock than you are carrying?' . . . — Q. And that was before Mr. Niles? A. That was before Mr. Niles. — Q. What did he say? A. Mr. Onthank answered me: Mr. Niles didn't. Mr. Onthank answered me, 'Why we have got to have \$24,000 capital stock to do \$150,000 business.'"

On his cross-examination the plaintiff, among other things, testified as follows:

"Q. Now, then, the representations were made at the first time you saw them; it was the first time you saw Mr. Niles, you say, that he told you they were doing \$150,000 worth of business? A. That isn't the only time. — Q. No, but he told you that the first time, and although he told you that you didn't want any

part of it then, is that so? A. Yes, I didn't want it. — Q. Now, then, why was it you changed your mind and decided to take a third of it? A. Because they drew up the plan of a corporation and they were going to work along with me. I hadn't got to go in there and shoulder it alone; they were going to work along with me. Mr. Niles was going to do everything in his power to help me, to help the business along; and Onthank was going out immediately, just as soon as he fixed up the corporation affairs. . . . The plaintiff further testified that he took the words of the defendants as to the good will of the business."

In the first case at the close of the evidence the defendant asked the judge to rule that upon all the evidence the plaintiff was not entitled to recover.

The defendant also asked the judge to rule as follows: "Even if the jury shall find that the defendant told the plaintiff that the firm were doing \$150,000 worth of business per year, and they also find that the defendant gave the plaintiff full opportunity to observe for himself what was being done, the plaintiff cannot recover."

The judge refused to make either of these rulings.

In the first case, the action of tort for deceit brought by Townsend against Niles, the jury returned a verdict for the plaintiff in the sum of \$4,500; and the defendant alleged exceptions.

In the second case, the action of contract on two promissory notes brought by Niles against Townsend and the indorsers, the jury returned a verdict for the plaintiff in the sum of \$3,445.85; and the defendants alleged exceptions, relating to the admission of certain evidence allowed to be introduced by the plaintiff Niles in regard to the fair value of the stall and good will of Niles and Onthank at the time of the purchase by Townsend.

H. H. Bond, for Townsend.

L. G. Brooks, for Niles.

SHELDON, J. These cross-actions grew out of the same occurrences and were tried together. Exceptions were alleged in each. 'It will be convenient however to consider them separately.

In the first named action Townsend seeks to recover damages for a fraudulent representation alleged to have been made to

him by Niles in the sale of a share in a provision business which had been carried on by Niles and one Onthank in Boston. The fraudulent representation alleged in the declaration and found to have been made was that Niles and Onthank were doing a business of \$150,000 annually. The questions now presented arise upon the refusal of the judge to rule as requested by the defendant that upon all the evidence the plaintiff was not entitled to recover, and that if the jury should find that the defendant told the plaintiff that the firm was doing a business of \$150,000 a year and also found that the defendant gave the plaintiff full opportunity to observe for himself what was being done, the plaintiff could not recover.

1. The defendant claims that the real inducement by which the plaintiff was persuaded to make his purchase was not the fraudulent representation, but the assurance that a corporation would be formed and that the defendant and Onthank would assist in forming it and in the corporation affairs, and that this assurance was merely a promise and not the false statement of an existing fact. Some of the plaintiff's testimony undoubtedly tended to support this contention as to what was the real inducement upon which the plaintiff acted, but upon the whole evidence we think it plain that the question was for the jury. Nothing said in the charge was excepted to, and it is not reported. We must therefore take it that the question was submitted to the jury with full and correct instructions.

2. The defendant contends also that the case here presented is like that of one purchasing goods which he is given full opportunity to examine and of which the condition is obvious upon examination. *Salem India Rubber Co. v. Adams*, 23 Pick. 256. *Manning v. Albee*, 11 Allen, 520, 522. *Brown v. Leach*, 107 Mass. 364. *Burns v. Lane*, 138 Mass. 350. *Deming v. Darling*, 148 Mass. 504, 505. But here again the question was for the jury. We cannot say as matter of law that the fullest examination of a stall in a market or of other premises in which the business of dealing in provisions at wholesale or retail is carried on would make manifest the truth or falsity of a representation as to the amount of business which is being done there. And under the circumstances of this case the same principle applies to the advice of third persons or to the examination of books so

far as this was or might have been made. See *Lewis v. Jewell*, 151 Mass. 845, 847; *Holst v. Stewart*, 161 Mass. 516; *Whiting v. Price*, 172 Mass. 240; *Arnold v. Teel*, 182 Mass. 1; *Long v. Athol*, 196 Mass. 497, 504; *Rollins v. Quimby*, 200 Mass. 162; *Thomson v. Pentecost*, 206 Mass. 505.

8. It cannot be said that the evidence taken together discloses such a failure on the part of the plaintiff to use reasonable care for his own protection as to preclude his recovery under the rule of *Poland v. Brownell*, 131 Mass. 138. The doctrine of that case is not to be extended. "It relates merely to seller's talk." *Light v. Jacobs*, 183 Mass. 206, 210.

In the second case, an action upon promissory notes given by Townsend to Niles, the only defense set up was the same deceit which was declared upon and recovered for in the other action. In that action Townsend recovered a verdict for \$4,500. The damage done to him is wholly made good by that recovery; he is placed in the same position as if the representation had been true; and he can have nothing more recouped from his note on account of a wrong for which he thus has been already fully compensated. It follows that, even if there were any error in the rulings or in the admission of evidence in this action, he would not be aggrieved by it, and so would have now no right of exception.

It does not appear and has not been suggested that the effect of this evidence may have been to reduce the amount of the verdict in the other case, and so have operated injuriously to Townsend. If he had apprehended this, his remedy would have been by alleging exceptions in that case, and then the question would have been open. He has not chosen to do this, apparently being satisfied with the amount which was awarded to him. He cannot have a double relief for the one wrong which was done to him.

In each case the order must be

Exceptions overruled.

MORRIS CHIUCCARIELLO vs. CHARLES H. CAMPBELL
& another.

MARIANO CHIUCCARIELLO vs. SAME.

Suffolk. November 21, 1911. — January 3, 1912.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DECOURCY, JJ.

Negligence, Employer's liability, In a factory, Automatic machine, Res ipsa loquitur.

If a boy fourteen years of age who, after being employed in a can making factory for two days, is set at work upon a machine having an arm which by a treadle being pushed down is caused to descend with force upon a stationary projection and which, if the machine is in order, should not descend without the treadle being pushed down, is injured within two hours after being set at work upon the machine by the arm descending upon his thumb without the treadle being pushed down, he can be found to be in the exercise of due care although once during the two hours that he was at work at the machine he saw the arm descend while his foot was off the treadle, if he did not know what it meant.

Where, at the trial of an action by an employee in a can making factory against his employer for injuries alleged to have been received because an arm upon a machine at which he was working, which should have descended only upon a treadle being pushed down, descended without any pressure having been applied to the treadle, there is evidence for the plaintiff tending to show only that the machine was comparatively new and had been used by the defendant less than six months, that if it had been built and maintained in proper order the arm should not have descended without pressure being applied to the treadle, and that there was no pressure upon the treadle at the time when the arm descended and injured the plaintiff, the question, whether the starting of the machine was due to negligence for which the defendant was liable, should be submitted to the jury.

TWO ACTIONS OF TORT, the first for personal injuries, received by a boy (hereinafter called the plaintiff) fourteen years of age while in the employ of the defendant in a can making factory and at work at a machine called a "Bliss Bumper," and alleged to have been caused by a defective condition of the machine; and the second action by the father of the plaintiff in the first, seeking damages for loss of services and expenses for medical attendance and medicines. Writs dated November 18, 1905.

In the Superior Court the cases were tried together before Bell, J. In the bill of exceptions the machine was described as follows: "The machine was operated by power. At its front were two projections or 'horns,' one stationary and the other

movable. At the bottom of the machine was a treadle, worked by foot. A can would be placed over the lower projection, then, by putting the foot on the treadle, the upper projection would come down on the can, clamping its seam. The upper projection would then go up and if the foot was taken from the treadle, the upper projection would remain at rest and not come down again." An expert machinist testified that, if the machine were built and maintained in perfect order, it should not "repeat," that is, the upper projection should not come down after returning to its upright position without the treadle again being pushed down.

The plaintiff testified that he was injured on the third day of his employment by the defendant, and that he was not set at work in any way at any machine until the morning of the third day; that after he was put at work on the machine the upper "horn" came down once before he was injured when his foot was off the treadle, but that he did not know what it meant. Later a foreman who had hired him came to him and told him he was not doing his work right and showed him how. "He then walked away and I worked for about five minutes. Then I took my foot off the treadle and picked up a can and went to put it on the lower horn. I heard something snap and the upper horn came right down on my thumb. I am sure my foot was off the treadle." The accident happened within two hours after the plaintiff had been set at work at the machine. The machine was a new one and had been installed in the factory less than six months before the accident.

At the close of the evidence the presiding judge ordered verdicts for the defendants; and the plaintiffs alleged exceptions.

E. Greenhood, for the plaintiffs.

W. H. Hitchcock, (*C. M. Pratt* with him,) for the defendants.

SHELDON, J. The jury could have found that the plaintiff in the first case was in the exercise of due care, and had not assumed the risk of the accident which happened. *Murphy v. Marston Coal Co.* 188 Mass. 385. *O'Neil v. Ginn*, 188 Mass. 346. *Donovan v. Chase Shawmut Co.* 201 Mass. 357.

The evidence tended to show that his injury was caused by the machine on which he was at work starting from a full stop without his having put it in motion by placing his foot upon

the treadle, which was the way it was intended to be started. An expert testified that this could not have happened without some defect in the machine. The machine was comparatively new, having been in use less than six months.

There is no dispute that from the fact of this unexplained starting at a time and under circumstances when it ought not to have started at all, the jury could have found that there was a defect of some kind in the machine, and that this defect was the cause of the undue starting or "repeating" to which the injury was due. But the defendants contend that this, standing by itself, would not have warranted the further inference of any negligence or failure of duty on their part; and unless such negligence could have been found, the judge acted correctly in ordering a verdict in their favor.

It is perfectly true that negligence ordinarily cannot be inferred from the happening of an accident to an employee or from the discovery in a machine or other instrumentality of a latent defect for which under the existing circumstances no responsibility can be imputed to the employer. There is no liability for injury to a servant unless there has been some negligence for which the master is liable. *Flynn v. Beebe*, 98 Mass. 75. *Roughan v. Boston & Lockport Block Co.* 161 Mass. 24. *Kennison v. West End Street Railway*, 168 Mass. 1. *Harnois v. Cutting*, 174 Mass. 398. *Hofnauer v. R. H. White Co.* 186 Mass. 47. *Hill v. Iver Johnson Sporting Goods Co.* 188 Mass. 75. *Saxe v. Walworth Manuf. Co.* 191 Mass. 338. *Curtin v. Boston Elevated Railway*, 194 Mass. 260. *Thompson v. National Fireworks Co.* 195 Mass. 327. *Childs v. American Express Co.* 197 Mass. 337. And in most cases of the unexplained starting of a machine, in which an action has been maintained for injuries thereby caused, there has been some further evidence of negligence on the part of the employer, either by evidence of previous instances of such starting, or of other trouble in operation, that were or ought to have been known to him, or that it was old, worn out, second-hand or otherwise in need of more inspection or repairs than it had received, or that it was improperly set up or adjusted, or that recent repairs had left it in bad condition, or otherwise. *Donahue v. Drown*, 154 Mass. 21. *Mooney v. Connecticut River Lumber Co.* 154 Mass. 407. *Connors v. Durite*

Manuf. Co. 156 Mass. 163. *Packer v. Thomson-Houston Electric Co.* 175 Mass. 496. *Gregory v. American Thread Co.* 187 Mass. 239. *Lynch v. M. T. Stevens & Sons Co.* 187 Mass. 397. *O'Neil v. Ginn*, 188 Mass. 346. *Fontaine v. Wampanoag Mills*, 189 Mass. 498. *Byrne v. Boston Woven Hose & Rubber Co.* 191 Mass. 40. *Ryan v. Fall River Iron Works Co.* 200 Mass. 188. *Donovan v. Chase Shawmut Co.* 201 Mass. 357. But although in many of the above named cases the conclusion reached was supported by such additional evidence, yet in others the employer was held liable by reason merely of the unexplained starting. This was so for example in *Byrne v. Boston Woven Hose & Rubber Co.* 191 Mass. 40. In *Mulvaney v. Peck*, 196 Mass. 95, the court approached this doctrine. In *Ryan v. Fall River Iron Works Co.* 200 Mass. 188, the judge at the trial instructed the jury that if they were not satisfied as to what was the specific cause of the starting of the loom, which was the instrumentality there in question, yet if it did start suddenly from a position of rest when it had been properly stopped, that could be taken to show not only that there was some defective condition in the loom, but also that there was negligence in connection with that defective condition. This instruction was held to be correct; and the present Chief Justice, in giving the opinion of the court, declared that "the unexplained automatic starting of a machine, when it ought to remain at rest" stood upon a different basis from other causes of injury to employees, and elaborately explained the reasons for holding that negligence of the employer might be inferred in such a case from the mere fact of the starting. The reasoning of that decision has not been criticised by this court; on the contrary it frequently has been cited with approval. *Donovan v. Chase Shawmut Co.* 201 Mass. 357, and 205 Mass. 248, 252. *Archer v. Eldredge*, 204 Mass. 323, 325. *Cormo v. Boston Bridge Works*, 205 Mass. 366, 369. *Sheehan v. Goodrich*, 207 Mass. 99, in which the plaintiff failed to bring herself within the principle.

We are of opinion that the cases should have been submitted to the jury.

Exceptions sustained.

SELDEN F. GREENE vs. HAROLD D. COREY & others.

Middlesex. November 22, 1911. — January 3, 1912.

Present: **BUGG, C. J., HAMMOND, BRALEY, SHELDON, & DeCOURCY, JJ.**

Practice, Civil, Auditor's report, Conduct of trial: order of evidence, requests and rulings. Contract, Implied in law, Performance and breach. Evidence, Presumptions and burden of proof, Opinion: experts. Stockbroker. Fraud.

Where the report of an auditor to whom an action at law was referred contains certain paragraphs setting out merely a statement of rulings of law which one of the parties had asked him to make and his rulings thereon, it is proper for the judge presiding at the trial of the case when the report is offered in evidence to exclude such paragraphs from the jury, since they are not strictly to be regarded as parts of the report, not containing any findings of fact and not being evidence for the jury.

Where the report of an auditor containing an erroneous ruling of law has been admitted in evidence subject to an exception by the defendant, the defendant is not entitled at the close of the evidence to have the presiding judge rule that "the jury must eliminate any consideration of the auditor's report because of his application of an erroneous rule of law," since the proper way to correct a mistake made by the auditor on a question of law is by instructions of the judge to the jury.

In an action of contract against a stockbroker by a customer, the declaration was in two counts, the first count containing allegations in substance that the plaintiff gave to the defendant at various times orders to buy and sell stocks for him upon margin and placed in the defendant's hands various sums of money as security for the defendant in connection with such orders, that the defendant agreed to carry out such orders and reported in each instance to the plaintiff that he had done so by an actual purchase or sale, that the defendant did not carry out his orders by actual purchases and sales, and therefore that he owed the plaintiff the sums so paid to him. The second count was for money had and received by the defendant to the plaintiff's use. *Held*, that, after the plaintiff had proved the payments to and the acceptance by the defendant of the sums of money for the purpose alleged, the burden was on the defendant to show that the money had been used in the manner authorized by the agreement with the plaintiff.

In an action of contract against a stockbroker by a customer, in which the plaintiff sought to have repaid to him sums of money which he alleged that he had paid to the defendant for use in making actual purchases and sales of shares of stock, the defendant relied upon certain instruments signed under seal by the plaintiff and purporting to release and discharge the defendant from such liability. The plaintiff's contention was that the defendant had procured the instruments from him because he relied upon false representations of the defendant that purchases and sales of stock actually had been made. At the trial of the case, after a report of an auditor to whom the case had been referred, which was favorable to the plaintiff on that issue, had been offered in evidence by the plaintiff, the plaintiff testified, and early in his direct examination was asked what knowledge he had with regard to the defendant's purchasing stock at the time he signed the

instrument of release, and answered that he "did not know anything about it." He then was asked "What was your intention?" and answered "My intention was for" the defendant "to purchase them." *Held*, that the evidence was admissible as tending to show the materiality of the alleged false representations upon which the plaintiff relied to avoid the releases, and that the regulation of the order in which the evidence should be admitted was within the discretion of the presiding judge.

In an action of contract against a stockbroker by a customer, the declaration was in two counts, the first count containing allegations in substance that the plaintiff gave to the defendant at various times orders to buy and sell stocks for him upon margin and placed in the defendant's hands various sums of money as security for the defendant in connection with such orders, that the defendant agreed to carry out such orders and reported in each instance to the plaintiff that he had done so by an actual purchase or sale, that the defendant did not carry out the orders by actual purchases and sales, and therefore that he owed the plaintiff the sums so paid to him. The second count was for money had and received by the defendant to the plaintiff's use. The plaintiff, by cross-interrogatories in a deposition of a member of a firm who executed the defendant's orders upon a stock exchange, asked for the details as to what was done by the deponent as to each order of the plaintiff to the defendant. The deponent answered in substance that because of the extent of the details asked for and the nature and extent of his firm's business he was unable in the time allowed him to answer the questions as asked. *Held*, that the cross-interrogatories and the answers thereto were competent upon the issue whether the purchases and sales in question actually had been made and whether shares of stock purchased were ready and available to be delivered to the plaintiff through the defendant if he paid the balance due from him and called for by the certificates.

It is for the judge who presides at the trial of an action where a question of the law of another State is in issue to decide whether a witness offered as an expert on such law is qualified as such. In the present case, in which the witness testified in direct examination that he had been a member of the bar of this Commonwealth for seven and a half years and that he had made a special study of the subject as to which his testimony was sought, and in cross-examination testified that he was not a member of the bar of the State whose law was in question, never had tried a case there, first had looked up the law of the other State on the subjects in question three and a half years before, had spent, at different times, enough time to amount to a day and a half in investigating the law with respect to the case on trial, and that he did not assume to be an expert on the law of the other State in general, but that he thought that he knew that State's law on the questions at issue. The presiding judge allowed the witness to testify as an expert. *Held*, that the action of the trial judge could not be said to have been clearly wrong.

In an action against a stockbroker by a customer for margins paid under an agreement by the stockbroker to purchase shares of stock in accordance with the customer's orders, the customer alleging that the stockbroker did not carry out his orders by actual purchases, it is no defense for the stockbroker to prove that the shares of stock which the customer ordered him to purchase were for sale on a stock exchange of another city, that he transmitted the orders to a correspondent upon that exchange, who executed them and thereafter had under his immediate control certificates of stock of the description bought by the customer in greater number and amount than the customer was carrying with the defendant, which certificates he was in a position to deliver immediately upon demand and pay-

ment of the price, unless it also is proved that other customers of the correspondent can have no claim upon the shares so held by them; for, in order to make an adequate defense under such circumstances, the defendant must prove that the correspondent had under his control, free from the just demands of other customers and available for delivery to the plaintiff, the shares of stock of which upon payment the plaintiff was entitled to demand delivery. Following *Fiske v. Doucette*, 206 Mass. 275.

In an action against a stockbroker by a customer for margins paid under an agreement by the stockbroker to purchase shares of stock in accordance with the customer's orders, the customer alleging that the stockbroker did not carry out his orders by actual purchases, it is not a sufficient defense for the defendant to prove that in good faith he transmitted the plaintiff's orders to reputable correspondents upon the stock exchange of a city where they could be carried out and paid the demanded price for their due execution and obtained a valid contractual obligation with such correspondents, if it does not also appear that the purchases were made as ordered by the plaintiff, the defendant being unable thus to shift upon another the responsibility which he had assumed by his contract with the plaintiff.

In an action of contract against a stockbroker by a customer, the declaration was in two counts, the first count containing allegations in substance that the plaintiff gave to the defendant at various times orders to buy and sell stocks for him upon margin and placed in the defendant's hands various sums of money as security for the defendant in connection with such orders, that the defendant agreed to carry out such orders and reported in each instance to the plaintiff that he had done so by actual purchase or sale, that the defendant did not carry out the orders by actual purchases and sales, and therefore that he owed the plaintiff the sums so paid to him. The second count was for money had and received by the defendant to the plaintiff's use. The defendant asked the presiding judge to rule as follows: If the plaintiff understood that the contractual relation between him and the defendant was one by which the defendant agreed to execute all the plaintiff's orders by taking up certificates in each case and putting them in his name and holding the specific paper, and if the defendant understood the contractual relation to be fulfilled on his part by wiring such orders to a correspondent upon a stock exchange where the stocks ordered by the plaintiff were dealt in for execution by purchase on the exchange, without taking up any certificates or putting any in the plaintiff's name, their minds never met and there never was any contract between them. *Held*, that the ruling could not be given, because, if the minds of the parties did not meet and there was no agreement between them, the defendant was not justified at all in using the plaintiff's money and must account to him for it.

In an action of contract against a stockbroker by a customer, in which the plaintiff sought to have repaid to him sums of money which he alleged that he had paid to the defendant for use in making actual purchases and sales of shares of stock, the defendant relied upon certain instruments signed under seal by the plaintiff, and purporting to release and discharge the defendant from such liability. The plaintiff's contention was that the defendant had procured his execution of the instruments by false representations. There was evidence tending to show that such an instrument, prepared for the plaintiff's signature, was sent by the defendant to the plaintiff each month with a statement apparently setting forth transactions in accordance with the plaintiff's orders and involving actual purchases and sales by the defendant in the plaintiff's behalf, that the defendant had not made such actual purchases and sales but intended that the plaintiff

should think that he had and that the plaintiff, relying on such representations, should sign the instruments, that the plaintiff believed the transactions set forth in the account to be real as there shown and, relying thereon, signed the instruments. *Held*, that there was evidence for the jury on the question whether the instruments were procured by false and fraudulent representations of the defendant, and that it could not be ruled as matter of law that the releases contained in the instruments were binding on the plaintiff.

CONTRACT against the members of a copartnership doing business as stockbrokers under the name of Corey, Milliken and Company. Writ dated July 7, 1909.

The declaration contained two counts. The first count alleged that the defendants held themselves out as carrying on the business of buying and selling stocks and other securities as brokers on orders from customers; that the plaintiff gave them at various times orders to buy and sell stocks on his account upon margin, and that between March 4, 1907, and October 7, 1908, he placed in their hands as security in connection with such orders sums of money amounting to \$4,988.01 and a certain bond alleged by him to be worth \$1,025; that the defendants agreed to carry out such orders and reported to the plaintiff in each instance that they had executed them by purchase and sale; that the defendants did not actually purchase or sell according to his orders, and therefore that they owed the plaintiff the sums of money and the value of the bond placed in their hands for margins, amounting to \$6,008.01. The second count was for the same sum as money received by the defendants to the plaintiff's use.

The answer set up a general denial, payment, accord and satisfaction and an account stated, release, and full performance by the defendants of their contract with the plaintiff.

The case was referred to Frank W. Kaan, Esquire, as auditor. After the filing of his first report, the case was recommitted to him for further report upon questions not now material.

The case was tried in the Superior Court before *Wait*, J.

After introducing and reading the auditor's reports, excepting those parts which were excluded as stated in the opinion, the plaintiff testified, and in the early part of his direct examination the following questions and answers were admitted, subject to exceptions by the defendant: "Q. Tell us what knowledge you had, doctor, with regard to the defendants purchasing stock at the time you signed these receipts. A. I did not know any-

thing about it. — Q. What was your intention? A. My intention was for them to purchase them." The following question and answer then were admitted without objection: "Q. Did you receive any notification from them that they had not purchased them? A. No."

The Leavitt mentioned in the opinion was a member of the firm of Leavitt and Grant, New York stockbrokers and members of the Consolidated Stock Exchange of New York. They were correspondents of the defendants. Interrogatories in writing were propounded by the defendants for the taking of Leavitt's deposition. The fourteenth interrogatory, referred to in the opinion, was as follows: "14. State whether or not you were in all cases able and ready to deliver any certificates bought on account of orders received directly or indirectly through Corey, Milliken & Co. or F. L. Milliken & Co. on receipt of the price thereof." The plaintiff filed in writing the following objection to the interrogatory: "The plaintiff objects to the fourteenth interrogatory for the reason that it is leading and calls for a conclusion on the part of the witness." Leavitt answered the interrogatory, "Yes." The interrogatory and answer were excluded by the presiding judge.

The fifteenth, sixteenth and seventeenth cross-interrogatories to Leavitt sought detailed statements as to the source from which the deponent's firm purchased certain shares of stock and as to what disposition was made of them and the certificates representing them after they were purchased, cross-interrogatory seventeen asking the deponent, as to each of fifty-five stock transactions, "kindly make answer . . . with regard to each stock in reference (a) from whom each certificate was received, (b) number of same, (c) name in which it stood, (d) disposition of same, (e) date of its sale, (f) address of person to whom sold, (g) price at which sold, (h) to whom and when delivered, (i) all books and memoranda assisting you in answering these interrogatories to be annexed as exhibits." The answers were, as to one transaction, that all that the deponent could say was that on the day named in the question his firm purchased shares of the number and description set out in the question from a certain firm, and that on the same day his firm "bought and sold thousands of shares of" the described stock "for the defendants and it is impossible for us to say when the particular twenty shares just de-

scribed were sold by them ;" that "a large portion of deponent's time and of the time of his partner and bookkeepers has been taken up in collecting the information embraced in the interrogatories and cross-interrogatories answered, which cross-interrogatories were only received by deponent on Tuesday last and it will be utterly impossible to answer many of the questions embraced in those two cross-interrogatories [the sixteenth and seventeenth] for the reasons already stated, and others for the reason that it would require a large force of clerks and an interruption of the business of Leavitt & Grant to a very serious and damaging extent."

Stephen S. FitzGerald, Esquire, was offered as an expert on certain matters of New York law relating to stockbrokers. In the examination with regard to his qualifications, he stated that he had been a member of the bar for seven and a half years and had made an examination of the law of New York with reference to brokers and their customs. On cross-examination, he stated in substance that he was not a member of the New York bar, had never tried a case in the State of New York, and first had occasion to look up the law on the subject of stockbrokers about three and a half years before in connection with another case; that he first gave some attention to the New York law in connection with this case shortly after the auditor's report was filed; that he should say that the total time spent in examination of the New York law with reference to this case was a day or a day and a half, spent at different times; that he did not claim to be an expert on New York law as a general proposition, but that he thought he knew what the law was in New York about stockbrokers and that he had some notes in regard to New York cases.

The presiding judge allowed Mr. FitzGerald to testify as an expert, subject to an exception by the defendants.

With regard to the releases, there was evidence as follows: Accompanying accounts sent monthly by the defendants to the plaintiff and apparently stating actual transactions in shares of stock, there were mailed to the plaintiff documents of the following form which he signed and returned to the defendants:

" Boston, Mass.,

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" Received of Corey, Milliken & Co. statement of account with them, which account is correct. In consideration thereof and

of one dollar and other considerations hereby acknowledged, I hereby release and discharge said Corey, Milliken & Co. from all causes of action and claims to this date, excepting however, the claim for the balance of assets in their possession according to said account June 1st, 1907.

"S. F. Greene (Seal)

"Please date, sign and return to
Corey, Milliken & Co.,
in enclosed stamped addressed
envelope."

Accompanying each such document was a letter reading as follows:

"Enclosed please find statement of your account. Owing to the large number of accounts on our books it is impossible for us, personally to verify every statement of our clients, and, while our clerical force endeavor to exercise the utmost care, mistakes will occasionally happen, and we wish you would kindly examine the enclosed statement, and if found to be correct please date and sign the receipt below and return to us. If incorrect, notify us immediately that we may rectify any errors.

"Thanking you for your valued orders, we remain,

"Yours very truly,

"Corey, Milliken & Co.

"The receipt below is a check upon our bookkeeping department and in the future will be attached to every statement. Your prompt attention will greatly oblige."

Other facts are stated in the opinion.

At the close of the evidence, the defendants asked the presiding judge to rule as follows:

"7. In a suit by a non-resident customer of a Boston broker against a Boston broker seeking to recover money deposited as margin for a running account in New York stocks, if it appears that the orders of the customer have been duly transmitted to a New York correspondent, who has duly executed such orders by purchase and sale of the stocks in question upon the floor of the stock exchange and ever thereafter, as long as the account of the customer with the Boston broker remains open, has under his immediate control

certificates of stock of the description bought by the customer in greater number and amount than the said customer is carrying with the Boston broker, which said certificates he is in a position to deliver immediately upon demand and payment of the price, it is immaterial whether the said New York broker has certificates under his immediate control equal to the possible claims upon him by all his customers upon outstanding purchases and sales of those particular stocks or not.

"8. The ordinary contractual relation between the Boston broker and his customer buying New York stocks upon margin does not compel the broker to prove that his New York correspondent from whom he buys such stock, during all of the time that the contractual claim of the customer of the Boston broker against the Boston broker is open, has stock under his immediate control, applicable to the individual account of the Boston customer and to an amount equal to all his contractual liabilities upon that particular stock under penalty of liability to the full amount of margin deposited by the customer, if such proof is not forthcoming.

"9. If the defendants in good faith transmitted the plaintiff's orders to reputable New York correspondents and paid the demanded price for due execution thereon and obtained a valid contractual obligation of such correspondents thereunder, they fulfilled their duty to the plaintiff in the premises.

"10. If the plaintiff understood the contractual relation between him and the defendants was one by which they agreed to execute all his orders by taking up certificates in each case and putting them in his name and holding the specific paper, and if the defendants understood the contractual relation to be fulfilled on their part by wiring such orders to New York correspondents for execution by purchase on the exchange, without taking up any certificates or putting any in the plaintiff's name, their minds never met and there never was any contract between them.

"11. If a Boston broker in response to orders for New York stock received from customers duly buys such stocks from his New York correspondent, who duly purchases them upon the floor of the stock exchange, and if the broker therefore has an open contractual claim upon such New York broker for such

stocks until such time as the said stocks may be sold under the orders of the Boston broker's customer, he has fulfilled the obligation to buy and carry.

"12. The purchase and sale of securities through the clearing house of the stock exchange of New York, with a delivery only of such balance as may result from the sum total of the day's transactions, is a purchase and sale sufficient to satisfy the obligation of the Boston broker buying New York stock in New York upon margin for his customer under the relation implied by law.

"13. It is not in any way inconsistent with the contractual obligation between a Boston broker and his customer buying New York stocks on margin in New York for the Boston broker to wire the several orders to his New York correspondent in his own name and to carry an open account for such specific orders with New York brokers in the name of the Boston broker without any disclosure of the name of the Boston customer, the Boston broker furnishing the margin as required by the New York broker on account of the sum total of his orders, paying the New York broker the same commission and being treated like any other customer buying and selling on margin, except with regard to rate of interest and commission, although there is no specific payment to the said New York brokers on account of the specific purchase of the Boston customer and although the Boston broker does not actually receive from or deliver to any of the New York brokers certificates for the shares bought and sold upon the order of the Boston customer, except when such certificates are called for by the customer and paid for in full.

"14. When a broker purchases New York stocks upon general account from a New York stockbroker at the request of a Boston customer buying upon margin, and carries such stocks so purchased in general marginal account which the Boston broker has with the New York stockbroker, there is no implied obligation on the Boston broker's part to have at all times under his personal control the shares of stock which he has purchased on orders for the Boston customer or an equal amount of shares of the same stock, provided he has the contractual obligation of the New York correspondent to deliver such stocks when paid in full for the same."

"16. The releases introduced in evidence are, upon all the evidence, binding upon the plaintiff.

"17. The releases in evidence are valid and binding and therefore the plaintiff has no claim except for such money as he paid the defendants after the date of the last release.

"18. There is no evidence that the New York correspondents of the defendants did not have on hand under their immediate control certificates at all times equal to the outstanding claims of all their customers."

"20. Upon all the evidence the plaintiff cannot recover."

"(1c) Upon the undisputed testimony the damage, if any, for breach of contract between the Boston and New York brokers caused by the failure, if any, on the part of the New York brokers to prove that they had at all times enough stock on hand to meet the possible requirements of all their customers, is nominal, and the claim of the customer of the Boston broker is, therefore, restricted to that amount."

"A. The jury must eliminate any consideration of the auditor's report because of his application of an erroneous rule of law."

The rulings were refused. The jury found for the plaintiff in the sum of \$5,461.40; and the defendants alleged exceptions.

H. W. Ogden, (H. H. Bond with him,) for the defendants.

G. Hoague, for the plaintiff.

SHELDON, J. The plaintiff claimed that he had put certain amounts of money into the hands of the defendants upon their promise to buy and sell for him upon a margin such property and securities as he should from time to time direct, his money to be a margin for the protection of the defendants; but that the defendants, though pretending to have made these purchases and sales, and to have applied properly the plaintiff's money as margins thereon, had not done so, and were bound to account to him for the amounts of his payments. While some other matters were nominally at any rate in issue, the real dispute between the parties was whether or not the defendants had made the purchases and sales which they were directed to make, and whether or not the plaintiff was bound by the terms of several releases which he had given to the defendants at the end of some successive months. There was no question that the plaintiff had made to the defend-

ants the payments which he claimed, or that these were to be used by the defendants as margins upon purchases and sales which, though to be made upon margins, were yet to be real transactions.

The case had been sent to an auditor and his reports were put in evidence, except that the judge excluded two paragraphs of the first report, which stated certain rulings of law that had been asked for by the defendants and the rulings which he made thereon. In our opinion these paragraphs, not being findings of fact and not being evidence for the jury, were not strictly to be regarded as parts of the report. The reading of them to the jury would have created a danger that the jury might have confused these rulings with those made by the judge, which alone were to govern them. The discretion of the judge was wisely exercised in excluding them. *Beach & Clarridge Co. v. American Steam Gauge & Valve Manuf. Co.* 208 Mass. 121, 124. *Fisher v. Doe*, 204 Mass. 84, 40. *Briggs v. Gilman*, 127 Mass. 580, 581.

So too the defendants' request numbered "A" could not have been given. Any mistake that had been made by the auditor on questions of law was to be corrected by proper instructions to the jury. *Tobin v. Kells*, 207 Mass. 804, 809, 810. *Hunneman v. Phelps*, 199 Mass. 15. *Picard v. Beers*, 195 Mass. 419. For another reason also this request was properly refused. The defendants' contention was that the auditor had erred in ruling that the burden was upon the defendants to show that they had used the money which the plaintiff had put into their hands in the manner authorized by their agreement with him, — that is, that they had executed or caused to be executed his orders for purchases and sales. They claim that this was clearly erroneous. We consider that it was correct. That was the effect of the decision in *Fiske v. Doucette*, 206 Mass. 275, 282; and it was the point decided in *Loneragan v. Peck*, 186 Mass. 361.

The plaintiff's testimony as to his knowledge about the defendants' having purchased the stocks which he had ordered and his intention that the defendants should make such purchases was competent. It tended to show the materiality of the false representations which, as he claimed, had been made to him and had induced him to sign the releases on which the defendants relied. The mere order of evidence was in the discretion of the judge and

is not to be reviewed by us. The plaintiff's testimony that he received no money when he signed these releases was competent for like reasons.

We see no ground on which the amount of the commission and profit received by the defendants from the plaintiff was material to the issues on trial. It was properly excluded.

The fourteenth interrogatory in the deposition of Leavitt was rightly excluded. Enough appeared to show that the answer to this question was merely a matter of opinion, an inference drawn correctly or incorrectly by the witness from facts which were themselves in evidence. The defendants' counsel in their brief have confused this with the eleventh interrogatory, which appears to have gone in without objection. The fifteenth, sixteenth and seventeenth cross-interrogatories and the answers thereto were competent upon the issue whether the purchases and sales in question had been actually made and whether the stocks bought were ready and available to be delivered to the plaintiff through the defendants if he had paid the balances due from him and called for the certificates.

It was for the judge to decide whether Mr. FitzGerald was qualified to testify to the law of New York. The witness testified that he had made a special study of the subject. We cannot say that the action of the judge was clearly wrong. *Teale v. Boston*, 165 Mass. 88, 89. *Howland v. Westport*, 172 Mass. 373.

The seventh and eighth requests for instructions could not have been given as asked for. The facts therein stated might all have been true, and yet the New York brokers might not have had under their control certificates to a sufficient amount which might rightly have been delivered to a particular customer. If these requests contained a correct and sufficient statement of the law, a broker who had undertaken to purchase and claimed that he had purchased on a margin a hundred shares of a particular stock for each one of a hundred different customers, and who was bound to deliver upon demand and full payment that number of shares to each customer, would conclusively establish against each customer the exact fulfilment of his obligation by proof that he had in his possession or under his immediate control barely more than a hundred shares of that

stock; and that would be so, although each one of his hundred customers should simultaneously make the same claim against him that is made in this case. If all transactions were real, it well might be that sales and purchases of stocks made and concluded through the clearing house of a stock exchange by many different brokers with each other for many different customers would result in leaving each broker in possession of the shares which he had purchased, and in the delivery of all which had been sold. But the very fact that a broker is not left in the possession of all the shares that he has undertaken to buy is of itself evidence tending to show that all of his pretended purchases have not really been made, that some of the deliveries that he should have seen to it that he received have not been made to him, either through the clearing house or otherwise. It is not that purchases and sales cannot be properly set off against each other; it is rather that the set-off cannot be a real one unless the opposite transactions that are so set off are themselves real ones, have really been made and carried out. The reasoning of the opinion in *Fiske v. Doucette*, 206 Mass. 275, is applicable. The broker, to put himself right in such a case as the one now before us, must show that he has under his control, free from the just demands of other customers and available for delivery to the particular customer whose case is in question, the stocks of which that customer upon payment will be entitled to demand delivery. This is the doctrine declared in *Fiske v. Doucette*, *ubi supra*, and we adhere to it. This was in substance the rule that was given to the jury; and the defendants have no ground of exception thereto.

The ninth request could not have been given. The defendants agreed to make purchases and sales for the plaintiff. That was the agreement as stated in the first letters interchanged between these parties; and we find nothing in their subsequent correspondence to vary this. Their agreement was that they would themselves carry out the transactions, not that they would rely upon a promise by another to do so or upon an assurance by another that he had done so. Under such circumstances, if they chose to accept the promise or assurance of another, they did so at their own risk. They had agreed to act themselves, and they reported to the plaintiff that they had done so; they

received his money on the faith of this promise and of these reports. They cannot shift their responsibility on another.

The tenth request could not have been given. If the minds of these parties never met and there was no agreement between them, the defendants were not justified in using the plaintiff's money at all, and must account to him for it.

The thirteenth request was really immaterial; for the plaintiff was permitted to recover only upon upon the ground that there had been no actual making of the purchases and sales ordered by him. It could not have been given in any event without adding the qualification that the certificates should have been immediately available and under the control of the defendants upon payment of the full price thereof.

The eleventh, twelfth, fourteenth and twentieth requests, and the one numbered 10 are sufficiently covered by what has been said.

The eighteenth request would have been misleading. The burden was on the defendants to account, as we already have pointed out. It cannot be said that it appeared that either the defendants or their New York agents had on hand certificates to the amount therein stated.

The sixteenth and seventeenth requests refer to the effect of the releases given by the plaintiff to the defendants. The plaintiff could not be relieved from the binding effect of these unless he showed that they were procured from him by fraud. Assuming that the defendants' misrepresentations as to the character and legal effect of these releases and as to their reasons for desiring to have the releases given to them were not of themselves sufficient to entitle the plaintiff to avoid the releases, yet the instructions requested could not have been given. There was ample evidence to justify a finding that he was induced to sign the releases by representations, which have been found to be false and fraudulent, that the defendants had actually made the purchases and sales which they reported to him, and that the accounts which they rendered to him were the correct accounts of real and not merely fictitious transactions. It is not worth while to recapitulate this evidence. It is the same evidence upon which it was found that no such purchases and sales had been made, although upon the issue of fraud the burden of course was on the plaintiff.

We have been carefully through the voluminous record, and cannot find that any of the defendants' rights have been infringed.

Exceptions overruled.

GEORGE W. ADAMS, administrator, vs. NORTH AMERICAN INSURANCE COMPANY.

Plymouth. November 24, 1911. — January 8, 1912.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DECOURCY, JJ.

Insurance, Fire: insurable interest. Bond, For a deed.

The owner of certain land with a building thereon executed and delivered a bond conditioned upon the conveyance of the premises by him to the obligee of the bond upon the obligee's paying a certain amount by monthly payments with interest, "said interest to be in lieu of rental for the use of said property," the obligee in the meantime agreeing to pay "taxes, insurance, water rates, and all other public liens and charges now or hereafter due from or levied against said property including repairs." The owner then insured the building to its full value and paid the premium and thereafter there were placed upon the property meane attachments to a large amount in actions brought against the owner. The owner never occupied the premises, but they were occupied by tenants who paid rent to the obligee. The obligee then assigned his interest under the bond to one who at once paid to the owner the balance due upon the bond. The owner assented in writing to the assignment but made no conveyance to the assignee. After the assignment the premises were destroyed by fire during the term of the policy. *Held*, that the insured had an insurable interest in the property to the extent of its full value.

CONTRACT, originally brought by Horatio Adams upon a policy of fire insurance upon property in Kingston. Writ dated November 12, 1908.

In the Superior Court the case was heard by *Pierce, J.*, without a jury, upon an agreed statement of facts which gave the court power to draw inferences from the facts therein stated.

It appeared that Horatio Adams purchased the premises insured on April 30, 1897. On the next day he gave a bond for a deed of the premises to one James Donley. That bond provided that, upon Donley paying \$500 and accrued interest to Adams, "said interest to be in lieu of rental for the use of said property," Adams should convey the premises to him, that the payments

should be monthly at the rate of \$6 a month, and that "Donley shall also pay all taxes, insurance, water rates, and all other public liens and charges now or hereafter due from or levied against said property including repairs." The monthly payments were made regularly. Adams never occupied the property. It always was occupied by tenants who paid rent to Donley.

On May 1, 1902, Adams insured the premises against fire with the defendant for \$800, the policy to run for five years. He paid the entire premium, \$6.

Between April 2, 1904, and February 21, 1905, there were placed upon the property mesne attachments in nine different actions in which the ad damnums amounted to \$157,000. These remained outstanding at the time this action was begun.

On April 8, 1905, Donley sold and assigned his right and interest under the bond for a deed to one George E. Cushman and Adams assented in writing to the assignment. Cushman at once paid Adams the balance due on the bond. Adams did not give a deed of the premises to Cushman at this time "because he thought all he had to do was to turn over the bond and that Cushman stood in his place."

The insured premises were destroyed by fire on November 15, 1906.

It was agreed that, if Adams had such an insurable interest as would support a recovery, there should be judgment to the extent of such interest, not exceeding \$800 with interest.

The trial judge found for the defendant; and the plaintiff, who after the trial had been admitted to prosecute the action in the place of his intestate, Horatio Adams, appealed.

J. S. Allen, Jr.; for the plaintiff.

W. L. Came, for the defendant.

SHELDON, J. The only question raised here is whether the original plaintiff had in the property insured an insurable interest sufficient to support a recovery; and it is agreed that if so, judgment shall be entered in his favor to the extent of that interest, not exceeding the amount of the policy.

He was the legal owner of the property. The title was in him. But he had given a bond for a deed to Donley; Donley, or his assignee Cushman, had paid the full agreed price; and the plaintiff was bound to convey to Cushman and apparently

thought, though erroneously, that he had done so by turning over the bond to Cushman. In the meantime nine different attachments to the aggregate amount of \$157,000 had been placed upon the plaintiff's real estate, all of which were still outstanding when this action was brought. The agreed price was \$500. The amount of the insurance was \$800. This was the state of affairs when the house was destroyed by fire.

The plaintiff had an insurable interest when he took out the policy, although he had agreed to sell the property for a fixed price to be paid by instalments, and to convey it upon full payment. But the price had not yet been fully paid, and the time for the conveyance had not arrived. If he should fail to keep his agreement by making the conveyance, he would at the election of Cushman be liable in damages. But he still owned the property and had a full insurable interest in it. *Thompson v. Gould*, 20 Pick. 134. *Wells v. Calnan*, 107 Mass. 514. *Hawkes v. Kehoe*, 198 Mass. 419. The ordinary principle, *res perit suo*, must be applied.

When the time came for making the conveyance, the property was subject to attachments to an amount far exceeding its apparent value. The purchaser could not have been compelled to accept a conveyance; and the plaintiff would have been liable for damages in a sum equal to the value of the property. This liability continued up to the time of the fire. He had a right to protect himself against it by insurance; and for this reason too he had an insurable interest to the full value of the buildings. The reasoning of the opinion in *Jenks v. Liverpool, & London & Globe Ins. Co.* 206 Mass. 591, 597, applies here.

The provision in the bond that the purchaser should pay for insurance does not indicate that the parties intended that the purchaser should have the insurable interest and should protect the property for his own benefit. This provision, like that for the payment of taxes and other charges, was inserted for the benefit and relief of the owner. As to insurance, it evidently contemplated that this should be in the name of the plaintiff, for his benefit, upon his property and payable to him. Otherwise the stipulation would have been needless.

The plaintiff, both when he took out the policy and when the building was burned, had an insurable interest to the full value

of the property. Under the agreed facts he is entitled to judgment for \$800 with interest from July 1, 1907.

So ordered.

**ROSE RENAUD, administratrix, vs. NEW YORK, NEW HAVEN,
AND HARTFORD RAILROAD COMPANY.**

Worcester. October 8, 1911. — January 4, 1912.

Present: RUGG, C. J., HAMMOND, BRALEY, & SHELDON, JJ.

Carrier, Of passengers: reasonable regulations. Negligence, Railroad, Causing death.
Evidence, Relevancy and materiality.

Discussion by RUGG, C. J., of the effect upon the contract of carriage of reasonable regulations posted by a common carrier of passengers and of violations thereof by passengers.

Where violation of a reasonable rule of a common carrier of passengers by a passenger does not involve malicious conduct, moral turpitude, gross and wilful disregard of the rights of others, or a plain surrender of the duty of a passenger, it does not of itself alone terminate the contract of carriage and transform the one who was a passenger into a trespasser or a bare licensee.

Under ordinary circumstances and where no other facts appear, a passenger who merely fails to observe a reasonable regulation of a common carrier of passengers does not thereby cease to be a passenger.

In an action by an administrator against a railroad corporation under St. 1909, c. 463, Part I, § 63, to recover for the death of the plaintiff's intestate who, when travelling as a passenger in a train of the defendant and as the train approached a station, arose from his seat and passed out upon the platform of the car and down to its lowest step, whence he was caused to fall by a current of air created by the rapid passing of another train of the defendant, the mere fact that the defendant had conspicuously painted on the panel inside of each door of the car in which the plaintiff's intestate had been riding the following regulation: "Passengers are forbidden to ride in any baggage car or on the platform or steps of any car," in the absence of evidence to show that the regulation was called to the attention of the intestate and that he chose to disregard it, is not evidence tending to show that, when killed, the plaintiff's intestate had ceased to be a passenger of the defendant.

In an action by an administrator against a railroad corporation under St. 1909, c. 463, Part I, § 63, to recover for the death of the plaintiff's intestate who, when travelling as a passenger in a train of the defendant and as the train approached a station, arose from his seat and passed out upon the platform of the car and down to its lowest step, whence he was caused to fall by a current of air created by the rapid passing of another train of the defendant, the plaintiff relied for recovery upon alleged gross negligence of the conductor and of the engineer of the train from which the intestate was caused to fall, and of the engineer of the train which had passed at high speed. The defendant offered

to prove that it had painted conspicuously on the inside of the doors of the car in which the intestate had been sitting the following regulation: "Passengers are forbidden to ride in any baggage car or on the platform or steps of any car." *Held*, that the evidence was admissible on the question, whether any of the employees of the defendant above designated had been guilty of gross negligence, since, if they knew of the regulation and did not know that it commonly was disregarded, they had a right to assume that passengers would obey it, and acts on their part, which if they were not acting upon such an assumption might be considered grossly negligent within the terms of the statute, might not be so considered if they justifiably were acting on such an assumption.

TORT under St. 1906, c. 463, Part I, § 68, for the death of the plaintiff's intestate. Writ dated November 8, 1906.

The case previously was before this court when exceptions taken by the defendant at a previous trial were sustained by a decision reported in 206 Mass. 557.

At the second trial in the Superior Court, which was before *Fox, J.*, the case was submitted to the jury only upon the first count of the declaration, which alleged that the plaintiff's intestate was a passenger on a train of the defendant at the time he was killed. The presiding judge ruled as a matter of law that there was no evidence of negligence of the corporation; that there was no evidence of unfitness of the servants and agents of the defendant company; and that there was no evidence of gross negligence of the servants and agents except on the part of the engineer of the express train, the engineer of the local train, and the conductor of the local train. The only issues for the jury were, whether the intestate at the time of his death was a passenger, and, if so, whether his death was caused by the gross negligence of any one or more of the above named servants and agents. There was evidence for the jury on both of these issues. Exceptions taken by the defendant and the matters to which they related are stated in the opinion. The jury returned a verdict for the plaintiff in the sum of \$4,500; and the defendant alleged exceptions.

A. J. Young, for the defendant.

D. I. Walsh, for the plaintiff.

RUGG, C. J. This is an action under St. 1906, c. 463, Part I, § 68, to recover damages for the death of the plaintiff's intestate, while a passenger. A reasonable inference was possible from one aspect of the evidence that the plaintiff's intestate, leaving his seat in a moving train of the defendant upon which he was

a passenger, went on the lower step of a car, and, while the train was still in motion, was thrown off the step and killed through the suction created by a train passing at a high rate of speed on the next track. The defendant offered to prove that there was conspicuously painted on the panel inside each door in the car in which the deceased was riding, this: "Regulations: New York, New Haven, & Hartford Railroad Co.: Passengers are forbidden to ride in any baggage car or on the platform or steps of any car." The chief question is whether the exclusion of this evidence was error.

A common carrier of passengers has a right inherent from the nature of its undertaking to make reasonable rules to govern the conduct of its passengers. *Commonwealth v. Power*, 7 Met. 596, 600. Moreover, this right is expressly conferred by statute. St. 1906, c. 463, Part II, § 181. Its public duty requires a common carrier to transport only persons who are willing to regard such rules, and its invitation to become passengers is confined to those who are prepared to conduct themselves according to regulations reasonably necessary for the protection of passengers and for the safe and convenient transaction of the business of the carrier in the light of its severe obligations. *Webster v. Fitchburg Railroad*, 161 Mass. 298. There can be no doubt as to the reasonableness of the regulation offered in evidence. *Wills v. Lynn & Boston Railroad*, 129 Mass. 351. *Sweetland v. Lynn & Boston Railroad*, 177 Mass. 574. *Cutts v. Boston Elevated Railway*, 202 Mass. 450, and cases cited at 455. Violation of a reasonable rule with knowledge of its existence precludes recovery by the person whose violation was a contributing cause of his injury. *Twiss v. Boston Elevated Railway*, 208 Mass. 108. *Bromley v. New York, New Haven, & Hartford Railroad*, 198 Mass. 453. *Tompkins v. Boston Elevated Railway*, 201 Mass. 114. It has been decided many times that a person injured while riding on the unenclosed platform of a railroad train or other exposed position assumes the risk of injury arising from such cause. See for example *Hickey v. Boston & Lowell Railroad*, 14 Allen, 429; *Fletcher v. Boston & Maine Railroad*, 187 Mass. 463. It has also been held that no duty of care rests on the carrier toward a passenger who disobeys the rules. *Dodge v. Boston & Bangor Steamship Co.* 148 Mass. 207, 219.

Where a railroad company seeks to justify the conduct of its servants by a rule, it is not necessary to show that notice of it was given to the plaintiff. *O'Neill v. Lynn & Boston Railroad*, 155 Mass. 871, 873. Commonly evidence of such a regulation as this has been admitted. *O'Brien v. Boston & Worcester Railroad*, 15 Gray, 20. *O'Laughlin v. Boston & Maine Railroad*, 164 Mass. 189. *Dixon v. New England Railroad*, 179 Mass. 242, 246.

But these decisions are not decisive in the case at bar, for the crucial point is whether the decedent was a passenger at the time of his injury. His due care was not in issue. Under the statute the plaintiff may recover, even though her intestate was not in the exercise of due care, provided he was a passenger. *Commonwealth v. Boston & Lowell Railroad*, 134 Mass. 211. *Hudson v. Lynn & Boston Railroad*, 185 Mass. 510. *Brooks v. Fitchburg & Leominster Street Railway*, 200 Mass. 8. There is no doubt that he was a passenger before he left his seat in the car. The narrow question is whether he forfeited his rights as passenger by violating the regulation in going upon the step of the car while the train was in motion. This point is not covered by *Jones v. Boston & Northern Street Railway*, 205 Mass. 108. The rule there under consideration did not forbid passengers to ride on the platform, but impliedly gave them permission to do so at their own risk. The regulation here presented absolutely prohibited in unequivocal terms the act of riding on the platform.

A common carrier is held, for the safety of passengers, to the highest degree of care consistent with carrying on its business. It is but just that passengers, in order to be entitled to this extraordinary care, should heed reasonable regulations made by the carrier for their convenience or security. The onerous obligation of care for passengers imposed by law on the carrier bears with it the correlative right to require observance of reasonable regulations for the safe transportation of passengers as a condition of continuance of the relation, and failure to comply with these will deprive the passengers of the protection to which they are entitled. The regulation offered in evidence was not complicated. It was so plain as to be easy of comprehension by an uneducated person. It required conduct only such as ordinary prudence on the part of a passenger would dictate. It was so

conspicuously displayed that it might well have been found to have come to the knowledge of the decedent. Such regulations sometimes have been referred to as terms of the contract of carriage (*Tompkins v. Boston Elevated Railway*, 201 Mass. 114) and sometimes as being broader than and different from contracts in their nature, in that they rest for their validity upon the power of the carrier to protect its passengers and itself by requiring conduct such as will conduce to safety and orderliness and promptness and efficiency of service. It is not necessary in the present case nicely to analyze their character.

It is the law in some jurisdictions that such regulations need not in all instances be brought home to the knowledge of the passenger in order to bind him.* But sounder reason supports the view that a regulation, in order to be binding upon the passenger, must be known to him. There need not be positive evidence that it was expressly called to his attention. Knowledge may be inferred from widely posted notices, from the experience of the passenger in travelling, from the nature of the rule itself as according with the dictates of common prudence, and from other significant circumstances. *O'Neill v. Lynn & Boston Railroad*, 155 Mass. 371. *Cheney v. Boston & Maine Railroad*, 11 Met. 121, 123. *Armstrong v. Montgomery Street Railway*, 123 Ala. 233, 247. *Macon & Western Railroad v. Johnson*, 38 Ga. 409, 437. *State v. Campbell*, 3 Vroom, 809.

These considerations would be decisive against a passenger seeking in his own right to recover damages for an injury. But this action is not by or in behalf of the passenger. It is not compensatory in its nature. It is brought under a penal statute to punish the railroad for causing through negligence the death of a passenger. The amount recovered does not go to his estate, but to his widow and children or next of kin. It is to be noted that this rule, although unequivocally prohibitive, did not by its terms undertake to state the consequences of its violation. It did not provide that infraction would terminate forthwith the rights of the offending passenger. It left the results of failure

* *Johnson v. Concord Railroad*, 46 N. H. 213, 222. *Whitesell v. Crane*, 8 Watts & S. 369, 373. *Trottinger v. East Tennessee, Virginia & Georgia Railroad*, 11 Lea, 533, 536. *Railroad v. Turner*, 100 Tenn. 213, 220. See *Sharkey v. Lake Roland Elevated Railway*, 84 Md. 163, 167.

to observe it to be fixed by the law. There was no evidence that notice had been given to the intestate on former occasions that he would not be regarded as a passenger if he violated this rule, or that he well knew this was the consequence generally regarded as flowing from his act, or that he was avoiding the servants of the carrier so that his conduct would be unobserved and no notice could be given him, or that he was in a place where passengers might not go under proper conditions. In the absence of some such circumstances, the contract of carriage did not come to an end by the passenger being upon the platform of the car as it approached the station, even though contrary to the rule. Violation of a reasonable rule of a common carrier by a passenger, not involving malicious conduct, moral turpitude, gross and wilful disregard of the rights of others or a plain surrender of the duty of a passenger, does not of itself alone terminate the contract of carriage and transform the one who was a passenger into a bare licensee or trespasser. There must also be a notice by the common carrier or some one acting in its behalf calling the attention of the passenger to his act, which may be due to inadvertence or momentary forgetfulness or misapprehension. A passenger who merely fails to observe such a reasonable regulation does not thereby, under ordinary circumstances without other facts appearing, cease to be a passenger. He puts himself in the wrong, and the carrier may withdraw from him the rights and privileges of a passenger; but until this is done expressly or impliedly the rights of the passenger are not terminated. The fact that a passenger was upon the platform of the car while it was in motion would not justify the servants of the carrier instantly in treating him as a trespasser and in forcibly and summarily ejecting him from the train, and in refusing to let him return to take his place as a passenger. Yet if he had ceased to be a passenger, this conduct would be well within the right of the carrier. *O'Brien v. Boston & Worcester Railroad*, 15 Gray, 20, 24. If after express notice of his wrongful conduct the passenger does not forthwith conform to the rule, then his rights as a passenger cease and he becomes a trespasser, and may be excluded from the train. But until notice of some kind, the relation of passenger is not ended. *Hull v. Boston & Maine Railroad*, ante,

159, and *Liversidge v. Berkshire Street Railway*, ante, 234, tend to support this view, although not reaching to the point now decided.

The clause of St. 1906, Part I, § 63, under which this action is brought, to the effect that no liability attaches to a railroad corporation "for the death of a person while walking and being upon its railroad contrary to law or to the reasonable rules and regulations of the corporation" does not help the defendant, because the pivotal inquiry is whether the plaintiff's intestate had ceased to be a passenger.

But upon another aspect of the case evidence of the "Regulation" was admissible. The plaintiff relied in part upon the gross negligence of the defendant's conductor and of the engineers of the express train and of the local train, as grounds of liability. Evidence upon which this was predicated as to the conductor was that as the train approached the station he came from the car, ahead of that in which the plaintiff's intestate was riding, upon the platform between the two cars, looked first into the car where the plaintiff's intestate was riding to see if he was getting up, and then looked ahead continuously by the side of his train to see if the express was coming. The jury might have found that the intestate standing upon the lower step of the car before it had come to a stop was whirled off by the current of air created by the passing express train, without knowledge of his presence there by the conductor. This being so, conduct which would constitute due care on the part of the conductor if the intestate knew of the rule would or might be very different from that required if there had been no rule and passengers were in the habit of riding upon the platform. The conductor ordinarily would have a right to assume that passengers would obey rules established for their safety and conspicuously posted. The standard of care which could be exacted of him might depend in vital measure upon his assumption that passengers would do their duty in this respect. No obligation to warn or otherwise care for passengers upon the platform or steps rested upon him while his train was in motion, if passengers had no right to be outside the car door until the train came to a stop, and the conductor did not in fact know of their presence there. If the rule was conspicuously posted, the conductor might assume with pro-

priety that passengers would comply with it and he would be in the exercise of due care if his conduct was that of a reasonably prudent man in view of that assumption. Due care did not require him to act on the theory that passengers would be negligent. Much less could he be found guilty of gross negligence for failure to act on that theory. As bearing upon the gross negligence of the defendant's conductor the rule should have been admitted in evidence. *O'Neill v. Lynn & Boston Railroad*, 155 Mass. 371. *Cutts v. Boston Elevated Railway*, 202 Mass. 450, 455. For the same reasons the regulation would be competent evidence bearing upon the gross negligence of the engineer of the express train and of the local train provided they or either of them knew of the posting of the regulation and did not know that commonly it was disregarded.

The remaining exception argued by the defendant is covered in large part by the earlier decision of this case, in 206 Mass. 557. But so far as not included in that decision no error is shown. Failure to see, on the part of a locomotive engineer, when he ought to have seen and when the consequences of such failure might result in the death of a human being, may be found to be gross negligence.

Exceptions sustained.

EMMA DESMARAIS vs. ELENOR TAFT.

Worcester. October 8, 1911. — January 4, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, LORING, BRALEY, SHELDON, & DECOURCY, JJ.

Frauds, Statute of, Sufficiency of memorandum.

The owner of a large tract of land on a certain street in a certain town, which was bounded on one side by land of P, who owned no other land on the street, and on the rear by a stone wall, agreed to sell a part of it for \$350, received from the purchaser \$100 and signed and gave to him a receipt which, after stating the name of the town and the date, read as follows: "Received \$100 from [the purchaser] in part payment for a piece of land next to P, seventy feet on the road and back to an old wall." *Held*, that the memorandum stated the boundaries of the lot with sufficient certainty to satisfy the requirements of the statute of frauds, R. L. c. 74, § 1.

CONTRACT for alleged breach by the defendant of an agreement to convey land to the plaintiff. Writ dated July 26, 1901.

In the Superior Court the case was heard by *King, J.*, without a jury, upon an agreed statement of facts. The facts are stated in the opinion. There was a finding and a judgment for the defendant; and the plaintiff appealed.

The case was submitted on briefs at a sitting of the court in October, 1911, and afterwards was submitted on briefs to all the justices.

J. E. Sullivan & D. F. O'Connell, for the plaintiff.

R. B. Dodge & W. J. Taft, for the defendant.

RUGG, C. J. The question here presented is as to the sufficiency under the statute of frauds of the description of real estate in the following memorandum:

"\$100.00

Northbridge, Mass., Aug. 7, 1900.

"Received one hundred dollars from E. Desmarais in part payment for a piece of land next to Pelequin, seventy feet on the road and back to an old wall.

"Elenor Taft."

The facts in connection with the memorandum were that the land was part of a large tract owned by the defendant, located on the northerly side of School Street and generally known as the Elenor Taft land, and not separated by any distinguishing mark from the large tract of which it was a part. The Pelequin mentioned in the memorandum owned only one tract of land on this street, and that was on the west side of the large tract. There was an old wall bounding the northerly side of the large lot of the defendant. The contract price for the lot was \$350. The statute of frauds (R. L. c. 74, § 1) requires a memorandum "to contain a description of the land sufficient for purposes of identification, when read in the light of all the circumstances of ownership of the property by the vendor. . . . Attendant circumstances may be shown outside the writing and by parol for the purpose of interpreting and applying the memorandum." *Harrigan v. Dodge*, 200 Mass. 357, 359, and cases cited. *Bradley v. Haven*, 208 Mass. 300. On the other hand, a description which, when applied to the physical features upon the surface of the earth and read in the light of the facts sur-

rounding the parties at the time of its execution, fails to identify particular land as alone conforming to its terms, does not satisfy the statute of frauds. *Doherty v. Hill*, 144 Mass. 465. *Miller v. Burt*, 196 Mass. 395. *Sherer v. Trowbridge*, 135 Mass. 500. *Madden v. Boston*, 177 Mass. 350, 359. Objects and circumstances can be resorted to for applying and translating the words of the memorandum into terms of land. The westerly boundary is definite in this memorandum, both as to position and length. It is adjacent to the Pelequin land, and extends from the road to the old wall. The southerly boundary is equally certain. It extends from the Pelequin corner easterly on the street seventy feet. On the rear or northerly side the boundary is the wall. The only bound not precisely defined is the easterly one, the description of which in the memorandum is "and back to an old wall." It is apparent from the agreed facts that the stone wall is longer than the rear line of the lot, for it is the line "of a large lot of the defendant." It may be inferred reasonably, from the memorandum as a whole, that the other side line is parallel to the Pelequin line. The tract is the "piece of land next to Pelequin" which is "seventy feet on the road and back to an old wall." This is in part a definition of a boundary and also a description of the shape of the tract. It is next to the Pelequin line bounding seventy feet on the road, and then in the same form runs back to the stone wall. The language of the memorandum is not unlike that which country folk would use when they meant a strip with parallel sides. Although verging toward vagueness, the description in the memorandum applied to the facts on the surface of the earth identifies a specific tract of land.

The exact consideration for the conveyance under our authorities need not be stated in the memorandum. *White v. Dahlquist Manuf. Co.* 179 Mass. 427, 431.

Judgment reversed.

CARLETON A. SIMMONS vs. CHARLES F. FISH.

Bristol. October 23, 1911. — January 4, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, SHELDON, &
DeCOURCY, JJ.*Practice, Civil, New trial, Verdict, Judicial discretion, Superior Court. Damages,*
New trial concerning.

Review by RUGG, C. J., of cases in which this court in ordering a new trial confined it to the specific issue affected by the error.

In an action for the loss of an eye through the alleged negligence of the defendant in permitting his son nine years of age to have possession and control of an air gun with which he shot the plaintiff, where the jury returned a verdict for the plaintiff in the sum of \$200 and the plaintiff made a motion for a new trial on the question of damages only, on the ground that the damages awarded were inadequate, in discussing the power of the Superior Court to grant such a motion, it was said, that it is only in exceptional and extremely rare instances that the inadequacy of damages will not be so interwoven with liability that justice can be done without a new trial upon the whole case, and that, although the court did not say that there could not be such a case, it was hard to conceive of one.

In an action by a boy for the loss of an eye through the alleged negligence of the defendant in permitting his son nine years of age to have possession and control of an air gun with which he shot the plaintiff, where the jury returned a verdict for the plaintiff in the sum of \$200, it was said, that it was inconceivable that any jury, who had agreed upon the issue of liability should have reached such a conclusion as to damages, and that the verdict itself was almost a conclusive demonstration that it was the result, not of a justifiable concession of views by the jurors, but of an improper compromise in regard to the vital principles which should have controlled the decision, and it was intimated, that setting aside such a verdict on the ground that the damages were inadequate and granting a new trial on the question of damages only would be an arbitrary exercise of discretion which would exceed the powers of the trial judge.

A motion by a plaintiff in an action for personal injuries, who has obtained a verdict in an amount which he deems inadequate, "that the verdict as to damages be set aside and a new trial ordered on the question of damages only," is not a motion to set aside the verdict, but only that one feature of the verdict may be disregarded, and an order purporting to grant such a motion is of no effect and does not set aside the verdict.

TORT, by a minor by his next friend, for the loss of an eye through the alleged negligence of the defendant in permitting his son, nine years of age, to have possession and control of an air gun with which he shot the plaintiff. Writ dated May 5, 1909.

In the Superior Court the case was tried before *Hardy, J.* The plaintiff discontinued against the defendant's son, Charles Fish, who originally had been made a defendant.

There was evidence that on Christmas, December 25, 1908, the defendant gave to his son Charles a King air gun from which small shot or other pellets could be discharged by means of compressed air. He also gave him some small shot to be used with the gun. On the same day the gun was discharged in such a manner as to cause a small shot to enter the plaintiff's eye, so injuring it that its removal was necessary. Evidence was introduced by the plaintiff in support of his declaration, and the defendant introduced evidence in contradiction thereof, excepting that the fact of the injury to the eye necessitating its removal was not in dispute, and the questions of liability and amount of damage were submitted to the jury.

The jury returned a verdict for the plaintiff in the sum of \$200; whereupon the plaintiff filed a motion as follows: "Now comes the plaintiff and says that the damages awarded are inadequate and moves that the verdict as to damages be set aside and a new trial ordered on the question of damages only."

The motion was heard by the judge, who indorsed the word "Allowed" on the back of the paper on which the motion was written. The defendant alleged exceptions.

The case was argued at the bar in October, 1911, before *Rugg, C. J., Hammond, Braley, & DeCourcy, JJ.*, and afterwards was submitted on briefs to all the justices except *Loring, J.*

R. P. Borden, (J. H. Kenyon, Jr., with him,) for the defendant.

J. W. Cummings, (C. R. Cummings with him,) for the plaintiff.

RUGG, C. J. The single question presented by these exceptions is whether the Superior Court had the power (before the passage of St. 1911, c. 501, expressly conferring it), in setting aside a verdict, returned by a jury for the plaintiff in an action to recover compensation for a personal injury, on the ground of inadequacy of damages, to direct that at the new trial damages shall be the only issue, and that the other questions shall be treated as settled in favor of the plaintiff.

There can be no doubt as to the power of the court at common law to set aside a verdict as a whole for insufficient as well as for excessive damages. *Sampson v. Smith*, 15 Mass. 865, 867.

Taunton Manuf. Co. v. Smith, 9 Pick. 11. *Clark v. Jenkins*, 162 Mass. 397. *Shanahan v. Boston & Northern Street Railway*, 193 Mass. 412. *Phillips v. London & South Western Railway*, 4 Q. B. D. 406; *S. C.* 5 Q. B. D. 78. *Johnston v. Great Western Railway*, [1904] 2 K. B. 250, 255. It is a constitutional incident of trial by jury, which cannot be taken away by legislative action, that the assistance and protection of the presiding judge shall be available to the litigants in setting aside verdicts not so supported by law and evidence that they ought to stand. *Opinion of the Justices*, 207 Mass. 606. *Capital Traction Co. v. Hof*, 174 U. S. 1, 18. The ancient common law doctrine that a verdict of a jury was single and indivisible and must stand or fall as a whole was early modified by the custom of this Commonwealth, as is pointed out in *Bicknell v. Dorion*, 16 Pick. 478, 483, where a verdict was set aside as to one of several defendants. The practice has prevailed for many years in this court of awarding a new trial upon a single point where the error committed in the trial court was of a kind which could be readily separated from the general issues, and applied without injustice to one matter.

In *Winn v. Columbian Ins. Co.* 12 Pick. 278, 288, a plaintiff, in an action upon a policy of insurance, dissatisfied with the verdict, was restricted upon a new trial, to which he was held to be entitled, to damages alone. In *Boyd v. Brown*, 17 Pick. 453, 461, which was an action for trespass for carrying away a schooner, the verdict was held to be for an excessive amount, and the new trial was confined to damages alone. *Robbins v. Townsend*, 20 Pick. 345, was an action to recover for the support of a pauper by the keeper of a house of correction. During the trial an error was committed in admitting evidence of the official character of the plaintiff. The court, in sustaining the exceptions, said: "There having been a full and legal trial on the merits as to the other parts of the case, and the question of the appointment of the plaintiff as master of the house of correction being entirely disconnected with the other questions raised, and one which in no way could have had any influence upon the finding of the jury upon those questions, the new trial is limited to this particular point. In cases like the present, substantial justice may be done without disturbing the verdict generally, by submitting to a new jury the question, in reference

to which, evidence was erroneously admitted." The money element established by the first trial and that as to the settlement of the pauper were left undisturbed. *Sprague v. Bailey*, 19 Pick. 436, was an action against a collector of taxes for taking personal property in levying a tax. Error was committed by the trial court touching proof whether the defendant had been duly sworn as collector, and the new trial was confined to that single issue and those necessarily dependent upon it, while other matters were left as settled by the first verdict. In *Amherst Bank v. Root*, 2 Met. 522, the only exception which was sustained related to the execution of a bond, and the court confined the new trial to the ascertainment of that fact alone. The only error committed by the trial court in *Hubbell v. Bissell*, 2 Allen, 196, 201, concerned one of several defendants, and bore upon the single ground of defense of mental incompetency, and the court granted a new trial only upon condition that it should be confined to that single issue, the facts found by the first verdict to stand in other respects. In *Seccomb v. Provincial Ins. Co.* 4 Allen, 152, there were actions upon policies of marine insurance. In the trial court, after a verdict for the plaintiffs, a new trial was granted solely for the purpose of submitting to another jury the question whether, according to the usage of commerce, Smyrna was a port in Europe, in all other respects the plaintiffs being held entitled to retain the benefits of the findings of the verdict in their favor. By reason of the conduct of parties, it was held that a new trial upon all issues was open, but by inference the restriction of the new trial to the single point was approved. *Wayland v. Wars*, 109 Mass. 248, was an action to recover for the support of a pauper. The only error committed by the trial court related to evidence on the question, whether one Davis was credited to the defendant town as a part of its quota of enlistments in the civil war. In sustaining the exceptions, the court restricted the new trial to that part of the case which had been affected by this error, and outlined alternative forms of judgment to be thereafter entered dependent upon the finding of that fact at the new trial. *Warshauer v. Jones*, 117 Mass. 345, was a writ of entry to recover one tract of land consisting of a passageway and a strip of land. Error was committed during the trial, and the court directed a verdict to stand as to the passageway, which was not affected by the error

of the trial court, and that the new trial be restricted to the rest of the demanded premises. In *Monies v. Lynn*, 119 Mass. 278, a special finding by the jury was set aside, and a general verdict allowed to stand. See *Hawks v. Truesdell*, 99 Mass. 557. During the trial upon complicated issues between several parties, in *Merchants' Ins. Co. v. Abbott*, 131 Mass. 397, 407, error was committed upon one aspect, which the court held to be separable from others, and granted a new trial conditionally as to that alone. In *Morrison v. Richardson*, 194 Mass. 870, the plaintiff's exceptions as to the rule of damages laid down by the trial court were sustained but the new trial was confined to damages alone. In *Gorham v. Moor*, 197 Mass. 522, error of the trial court touching the issue of undue influence over a testator was not allowed to affect the verdict as to soundness of mind. See also *Blackburn v. Boston & Northern Street Railway*, 201 Mass. 186. *Dulligan v. Barber Asphalt Paving Co.* 201 Mass. 227, 233, was an action in two counts, the first to recover for the death, and the second for the conscious suffering, of an employee of the defendant under R. L. c. 106. A mistake of the trial court touching the first count was not permitted to disturb the verdict in favor of the plaintiff upon the second count. See also *Pratt v. Boston Heel & Leather Co.* 134 Mass. 300; *Bardwell v. Conway Mutual Fire Ins. Co.* 118 Mass. 465, 469; *Negus v. Simpson*, 99 Mass. 388, 395; *Dyer v. Rich*, 1 Met. 180, 192; *Ryder v. Hathaway*, 21 Pick. 298, 306; *Boyd v. Brown*, 17 Pick. 453; *Kent v. Whitney*, 9 Allen, 62; *Hunter v. Farren*, 127 Mass. 481, 485; *Whipple v. Rich*, 180 Mass. 477, 480; *DeForge v. New York, New Haven, & Hartford Railroad*, 178 Mass. 59, 64; *John Hetherington & Sons v. William Firth Co.* 210 Mass. 8; *Thomson v. Pentecost*, 206 Mass. 505, 513; *Stynes v. Boston Elevated Railway*, 206 Mass. 75, 78; *Montgomery Door & Sash Co. v. Atlantic Lumber Co.* 206 Mass. 144, 147, all of which are instances of new trials as to damages alone, sometimes on the exceptions of one party, sometimes on those of another, and sometimes on those of both.

This review of our cases demonstrates that this court continuously from early times has exercised the power of narrowing a new trial to specific points in cases where the error committed at the trial was so limited in character as with justice to both parties

to be separable from the other issues determined by the first verdict. It has done this as a part of its inherent judicial authority, and not under any statute. It has exercised the power in a great variety of cases touching divers kinds of issues involved in general verdicts. The guiding principle is that, although a verdict ought not to stand which is tainted with illegality, there ought to be but one fair trial upon any issue, and that parties ought not to be compelled to try anew a question once disposed of by a decision against which no illegality can be shown. Thus the parties and the Commonwealth have been saved the expense, annoyance and delay of a retrial of issues once settled by a trial as to which no reversible error appears. Most of these cases show action by this court as an appellate tribunal whose jurisdiction in this regard is broad. But they show also that in reason where a verdict is set aside for any cause for which it may be by a trial court, the new trial may be limited in range. The Superior Court is a court of general jurisdiction, and it has the power to set aside verdicts and "order a new trial for any cause for which a new trial may by law be granted," (R. L. c. 173, § 112,) in which are included excessive or insufficient damages. If it is convinced upon a review of the whole case that the jury have settled the issue of liability fairly and upon sufficient evidence, so that dissociated from other questions it ought to stand as the final adjudication of the rights of the parties, and that there has been such gross error in the determination of damages as requires the setting aside of the verdict, that court has the power to do so, and confine a new trial to damages alone. It is a power which ought to be exercised with great caution, with a careful regard to the rights of both parties, and only in those infrequent cases where it is certain and plain that the error which has crept into one element of the verdict by no means can have affected its other elements. But when a proper occasion clearly exists, it is in the interests of justice to exercise the power. There is nothing inconsistent with this view in the decision of *Timpany v. Handrahan*, 198 Mass. 575. The language of the opinion that there can be no "division of a verdict by a judge in such a way that it shall stand in that part which is satisfactory to him and shall be cancelled in that part with which he is dissatisfied" was used in deciding the narrow point of practice then under discussion. A verdict

cannot be divided, but it can be set aside as a whole and an order entered that at the new trial where a final verdict shall be rendered the range of inquiry as to facts shall be limited to issues less than those open upon a general trial. No sound distinction in this regard can be made between a verdict in which excessive damages have been returned and one in which inadequate damages have been awarded. Indeed, it is said in the *Opinion of the Justices*, 207 Mass. 606, 609, referring to a proposed statute in terms limiting a new trial to the question of damages alone, when that is the sole ground for granting a new trial: "In substance the section is in accordance with the general practice to grant a new trial upon the question of damages only, if the verdict is satisfactory in all particulars as a determination of the liability."

It is undoubtedly true that in England there can be no limitation of a new trial to specific issues without consent of both parties. There a new trial means a new trial as to all issues, unless by agreement of parties. *Watt v. Watt*, [1905] A. C. 115, overruling *Belt v. Lawes*, 12 Q. B. D. 856, a contrary decision in the court of appeal. The great weight of authority in this country supports the conclusion we have reached.*

It is strongly argued by the defendant that the verdict, being only \$200 for the loss of an eye, was virtually a verdict for the defendant, and that he may have suffered rights to lapse of which he would have availed himself had he foreseen that the issue of liability would be treated as finally established against him. If substantial exceptions had been taken by the defendant upon

* *Lisbon v. Lyman*, 49 N. H. 553, 582-605. *Lake v. Bender*, 18 Nev. 861, 869-881. *Duff v. Duff*, 101 Cal. 1, 5. *San Diego Land & Town Co. v. Neale*, 78 Cal. 63. *Woodward v. Horst*, 10 Iowa, 120. *Ramsdell v. Clark*, 20 Mont. 103. *Schlitz Brewing Co. v. Ester*, 86 Hun, 22. *Lavells v. Corrignio*, 86 Hun, 135. *Laney v. Bradford*, 4 Rich. (S. C.) 1. *Walker v. Blassingame*, 17 Ala. 810. (See *Edwards v. Lewis*, 18 Ala. 494.) *Zaleski v. Clark*, 45 Conn. 397, 404. *McKay v. New England Dredging Co.* 93 Maine, 201. *Treat v. Hiles*, 75 Wis. 265, 276. (See *Hutchinson v. Piper*, 4 Taunt. 555.) *Burnett v. Roanoke Mills Co.* 152 N. C. 85, 41. *Goss v. Goss*, 102 Minn. 846. *Fry v. Stowers*, 98 Va. 417. *More-Jonas Glass Co. v. West Jersey & Seashore Railroad*, 47 Vroom, 9. *Clark v. New York, New Haven, & Hartford Railroad*, 33 R. I. 83. *Cramer v. Barmon*, 193 Mo. 327.

Contra: *State v. Templin*, 122 Ind. 285. *Johnson v. McCulloch*, 89 Ind. 270. *Seaboard Air Line Railway v. Randolph*, 129 Ga. 796. *Central of Georgia Railway v. Perkerson*, 112 Ga. 923.

any issue other than that of damages, or if in other respects the defendant's rights have been impaired by relying upon the verdict, it would be capricious and not just to restrict a new trial to damages alone. If facts of this character appeared upon the record, a different case would be presented. There is nothing to show the existence of such circumstances. The bald question raised upon this branch of the case is as to the power of the Superior Court to grant a new trial upon this restricted issue. It is only in exceptional and extremely rare instances that the inadequacy of damages will not be so interwoven with liability that justice can be done without a new trial upon the whole case. Although we do not say that there cannot be such a case, it is hard to conceive of one.

It is urged that this was a compromise verdict, where certain jurors must have conceded their conscientious belief that the defendant ought to prevail to the end that agreement might be reached. In order to pass upon the soundness of this argument, it becomes necessary to inquire what a compromise verdict is, and to ascertain whether this was such a verdict. It was said by Cooley, J., in *Goodsell v. Seeley*, 46 Mich. 623, at 628, "It is no doubt true that juries often compromise . . . and that 'by splitting differences' they sometimes return verdicts with which the judgment of no one of them is satisfied. But this is an abuse. The law contemplates that they shall, by their discussions, harmonize their views if possible, but not that they shall compromise, divide and yield for the mere purpose of an agreement. The sentiment or notion which permits this tends to bring jury trial into discredit and to convert it into a lottery." See also *Meyer v. Shamp*, 51 Neb. 424, 430. While jurymen must not go contrary to their convictions, they properly ought to give great heed to the opinions of their fellows, and by reasonable concessions reach a conclusion which, although not that originally entertained by any of them, nevertheless may be one to which all can scrupulously adhere. *Dorr v. Fenno*, 12 Pick. 521. *Commonwealth v. Tuey*, 8 Cush. 1. *Commonwealth v. Whalen*, 16 Gray, 25. *Commonwealth v. Poisson*, 157 Mass. 510. *McCoy v. Jordan*, 184 Mass. 575. *Highland Foundry Co. v. New York, New Haven, & Hartford Railroad*, 199 Mass. 403. *Scholfield Gear & Pulley Co. v. Scholfield*, 71 Conn. 1, 23. *Hamilton v.*

Owego Water Works, 22 App. Div. 573, 578, affirmed 163 N. Y. 562. *Wolf v. Goodhue Fire Ins. Co.* 43 Barb. 400, 407, affirmed 41 N. Y. 620. *Owens v. Missouri Pacific Railway*, 67 Texas, 679, 684. *Benedict v. Michigan Beef & Provision Co.* 115 Mich. 527. *Snyder v. Lake Shore & Michigan Southern Railway*, 181 Mich. 418. A verdict which is the result of real harmony of thought growing out of open-minded discussion between jurors with a willingness to be convinced, with a proper regard for opinions of others and with a reasonable distrust of individual views not shared by their fellows and a fair yielding of one reason to a stronger one, each having in mind the great desirability of unanimity both for the parties and for the public, is not open to criticism. But a verdict which is reached only by the surrender of conscientious convictions upon one material issue by some jurors in return for a relinquishment by others of their like settled opinion upon another issue and the result is one which does not command the approval of the whole panel, is a compromise verdict founded upon conduct subversive of the soundness of trial by jury. The jury room cannot be entered in order to ascertain what has transpired there. Its deliberations are in secret, and ordinarily cannot be made the subject of testimony by jurors. *Woodward v. Leavitt*, 107 Mass. 453. What went on there may be learned by other sources. *Wright v. Abbott*, 160 Mass. 895. It is not infrequently possible to determine with some approximation to accuracy what went on there from the result produced. This is such a case.

It seems plain from the record that this was a compromise verdict. The issue of liability was contested at the trial. There was no contest as to the injury done. It was such as necessitated the removal of the eye of a boy under twenty-one years of age. He must go through life, which may be a long one, disabled and disfigured. The severity of the injury need not be elaborated, for it is beyond contention. The damages under the law, if liability was established, should have been assessed not according to the degree of culpability of the defendant, but solely upon the basis of compensation to the plaintiff. The single question was what was the money value to be awarded to a boy for the loss of an eye. The jury said \$200. It is inconceivable that any jury, having agreed upon the issue of liability, should have

reached such a determination as to damages. They had no right to consider the subject of damages until they had settled the liability in favor of the plaintiff. The verdict itself is almost conclusive demonstration that it was the result, not of justifiable concession of views, but of improper compromise of the vital principles which should have controlled the decision. The inference is irresistible that it could have been reached only by certain of the panel conceding their conscientious belief that the defendant ought to prevail upon the merits in order that a decision might be reached. It is possible that a trial judge might let such a verdict stand, for various reasons: as, for instance, if on the whole it should appear to him that a verdict for the defendant ought not to have been set aside. But it would be a gross injustice to set aside such a verdict as to damages alone against the protest of a defendant, and force him to a new trial with the issue of liability closed against him when it appears obvious that no jury had ever decided that issue against him on justifiable grounds. Although the decision of a motion for a new trial rests within the discretion of the trial court (*Welsh v. Milton Water Co.* 200 Mass. 409, *Scannell v. Boston Elevated Railway*, 208 Mass. 513, *Powers v. Bergman*, ante, 346, and cases cited in each of these opinions) it is a sound judicial and not an arbitrary discretion which must be exercised. A failure in this regard is subject to revision. However, the present case does not require a decision upon this ground, as the exceptions must be sustained for another reason.

The motion of the plaintiff was that the "verdict as to damages be set aside and a new trial ordered on the question of damages only." The Superior Court simply "allowed" the motion. It is to be noted that this is not the common form of motion. By the unusual form of his motion the plaintiff sought not a setting aside of the verdict but simply one aspect of it. Indeed, it is not a motion for a new trial at all, but only that one feature of the verdict be disregarded and that a new jury pass upon that feature. This is not correct practice. The only motion known to the law in this connection is one for setting aside the verdict and ordering a new trial. If granted, the entire verdict is set aside. A verdict as the foundation of a judgment in law is an elemental entity, and cannot be "divided

by a judge." *Timpany v. Handrahan*, 198 Mass. 575. It must either stand or be set aside. If it is set aside, the new trial may be restricted, as has been pointed out. That is a determination which can be made logically only after the verdict is set aside. But the plaintiff by the form of his motion apparently undertook to give to the court no opportunity to set aside the verdict as a whole, and the form in which the decision of the court was expressed restricts its scope to the phrase of the motion, and does not go beyond it. It follows that the verdict has not been set aside.

Exceptions sustained.

HENRY O. DAVIS vs. FLORA DOWNER & others.

Essex. November 9, 1911. — January 4, 1912.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DECOURCY, JJ.

Trust, Resulting. *Frauds, Statute of. Equity Jurisdiction, Specific performance. Estoppel, In equity. Equity Pleading and Practice, Laches.*

In a suit in equity by a member of a partnership, consisting of the plaintiff and his brother, to compel the conveyance to the partners of a certain parcel of real estate, which had been conveyed to one of the defendants without consideration by the mother of the partners, it appeared, that the title to the land had been taken in the name of the mother of the partners, that the purchase price was \$250, that \$50 of this was paid in cash by the partners, and that for the balance two mortgages, each for \$100, were executed by the mother upon the understanding that the mortgage notes should be paid by the partnership, that there was an oral understanding that the mother held the title to the land in trust for the benefit of the partnership and would convey it to the partners at any time on demand, that a factory was built on the land by the partners wholly with the partnership money, and that the mortgages were paid by the partners. The defendants pleaded and relied upon the statute of frauds. *Held*, that these facts showed a resulting trust for the benefit of the partnership and that the plaintiff was entitled to relief.

In a suit in equity by a member of a partnership, consisting of the plaintiff and his brother, to enforce an oral agreement for the conveyance to the partners, subject to an existing incumbrance, of a certain parcel of real estate, which had been conveyed to one of the defendants without consideration by the mother of the partners, it appeared that the land when conveyed to the mother of the partners was vacant, that the mother paid \$265 for the land partly in cash and partly by a mortgage on it, upon an understanding that she would convey the property to the partners at any time for \$300, that pursuant to this understanding the partners paid the mortgage given in part payment by the mother and

expended money for the partial construction of a dwelling house on the land, that later the mother gave a mortgage upon the property, which was outstanding at the time of the filing of the bill, for \$2,000, the proceeds of which were used upon the construction of the house, that when the house was finished the two partners moved into it, and that, during the period of several years before the filing of the bill, they paid the taxes and insurance and the interest on the mortgage, and continued in occupation. The defendants pleaded and relied upon the statute of frauds. *Held*, that, the partners having been induced to make expenditures upon the land and to change their situation materially in reliance upon the performance of the oral agreement and in expectation of the rights it was to confer, the defendants were precluded from setting up the statute of frauds.

The defense of laches to a suit in equity cannot be availed of unless set up in the pleadings. In the present case no such defense could have been sustained on the facts.

BILL IN EQUITY, filed in the Superior Court on August 4, 1908, by Henry O. Davis of Gloucester against Flora Downer, the plaintiff's sister, Iretta Davis, the plaintiff's mother, and Oscar S. Davis, the plaintiff's brother and former partner, with a prayer for a decree that the two lots of land mentioned in the opinion, which were conveyed to the defendant Downer by the defendant Iretta Davis, were held by the defendant Downer for the use and benefit of the partnership consisting of the plaintiff and the defendant Oscar S. Davis, and that the defendant Downer be ordered to convey to the plaintiff one undivided half of said lots subject to any existing incumbrances thereon.

The answers of the defendants, as amended, set up the statute of frauds.

In the Superior Court the case was referred to William Perry, Esquire, as master, and later was heard by *Schofield*, J., who overruled exceptions to the master's report and made a final decree confirming the master's report as to all matters of fact contained therein and ordering that the bill be dismissed. The plaintiff appealed. The material facts found by the master are stated in substance in the opinion.

F. H. Tarr, for the plaintiff.

A. B. Tolman, for the defendants Flora Downer and Iretta Davis.

E. S. Taft, appeared for Oscar S. Davis but filed no brief.

RUGG, C. J. This is a suit in equity by which the plaintiff seeks to establish the right of a partnership, composed of himself and his brother Oscar, to the conveyance of two parcels of

real estate. The two parcels are known respectively as the "factory lot" and the "home lot." The master's findings of facts must be taken as final, the evidence not being reported.

1. The title to the "factory lot" was taken in the name of Iretta Davis in 1897. The purchase price was \$250, of which \$50 was paid in cash by the partnership, and the balance by two mortgages, each for \$100, executed by Iretta Davis. It was the oral understanding that she held title in trust for the benefit of the firm, and would convey it to the firm at any time on demand. In March, 1901, the mortgages were paid by the firm. A factory was built upon the land by the firm wholly with its money, with an exception so trifling as to be negligible. These facts are sufficient to establish a resulting trust under the well recognized equitable principle, that where one pays for real estate but the conveyance is to another, a resulting trust arises in favor of the one who pays the purchase price against the grantee named in the deed, the latter being treated as subject to all the obligations of a trustee, notwithstanding the statute of frauds. *Howe v. Howe*, 199 Mass. 598, and cases cited at 601. *Lombard v. Morse*, 155 Mass. 136. *Bailey v. Hemenway*, 147 Mass. 326, 328. *Cooley v. Cooley*, 172 Mass. 476, 477. *Frankel v. Frankel*, 173 Mass. 214. Sometimes there may be a presumption of a gift instead of a resulting trust where the parties are not strangers and the person paying the consideration is under some natural or legal obligation to provide for the one in whose name the title is taken. But that question is not material here, for the facts have been expressly found. It is always open to show the facts to rebut such presumption. *Lufkin v. Jakeman*, 188 Mass. 528, 530. The application of the principle just stated is not affected by the circumstance that at the time of the original purchase the grantee executed mortgages for a part of the purchase price. This was done upon the understanding that the mortgages should be paid by the partnership, an agreement which was carried out, and the grantee was thereby exonerated from all liability, and the entire consideration really was paid by the partners. It was the equivalent of a loan of credit by the grantee for the benefit of persons paying for the purchase. It can stand on no different ground from a loan of money. *McDonough v. O'Neil*, 113 Mass. 92. It follows that the rule of *McGowan v. McGowan*, 14 Gray,

119, *Dudley v. Dudley*, 176 Mass. 84, *Kennerson v. Nash*, 208 Mass. 393, and other like decisions, to the effect that, where two or more persons contribute indiscriminately to the purchase price without agreement as to the proportion of interest to be held by each and the title is taken by one, no trust results in favor of the others, does not govern the case at bar.

2. The facts as to the "home lot" were that, being then vacant land, it was conveyed to Iretta Davis, who paid therefor \$265 partly in cash and partly by mortgage on it, upon an understanding that she would convey the property to the two members of the partnership at any time for \$300. Pursuant to this understanding and in reliance upon it, six months later the firm paid the mortgage given in part for the purchase price, and afterwards expended money for the partial construction of a dwelling house, and subsequently Iretta Davis gave a mortgage, still outstanding, to a savings bank for \$2,000, the proceeds of which were used toward the house, and when it was completed the two partners moved into it. Its total cost was considerably in excess of the savings bank mortgage, and this excess was paid by the partnership. During the several years since the purchase, they have paid the taxes, insurance and interest upon the mortgage, and have continued in occupation. The question is whether the oral promise by Iretta Davis to convey is enforceable. The statute of frauds is urged against its enforcement. But fraud itself may be enough to avoid the defense of the statute of frauds. Where a person has been induced to make expenditures upon land, to construct improvements thereon or to change his situation materially in reliance upon the performance of the oral agreement and in expectation of the rights to be acquired thereby, refusal to carry out the agreement is not merely deprivation of the rights it was intended to confer, which alone is within the statute of frauds, but is in addition "an infliction of an unjust and unconscientious injury and loss. In such case, the party is held, by force of his acts or silent acquiescence, which have misled the other to his harm, to be estopped from setting up the statute of frauds." *Glass v. Hulbert*, 102 Mass. 24, 36. This principle is well established and frequently resorted to. *Williams v. Carty*, 205 Mass. 396, and cases cited at 400. It governs this branch of the case at bar rather than that followed in *Burns v. Dag-*

gett, 141 Mass. 368, relied on by the defendants. It would be unreasonable for a court of conscience to permit the defendants to retain the advantage of all these expenditures and improvements, to the cost of which they have directly lured the plaintiff and his partner by falsely leading them into the belief that the conveyance would be made.

3. The incident that the plaintiff's partner has allied himself with the other defendants makes no difference with the principles of law by which the rights of the partnership are governed. The conveyances by Iretta Davis to the defendant Downer, who was not a purchaser for value, with full notice of all existing equities, render her amenable to the relief afforded by a chancery court to the same extent as her grantor would have been.

4. The defense of laches cannot prevail. It is not pleaded. *Kershishian v. Johnson*, ante, 135. But, even if it had been, it could not be sustained. There appears to have been nothing to lead the plaintiff to think that he would need to resort to equity for relief until after the quarrel between himself and his mother, and his suit was then seasonably commenced. *Low v. Low*, 173 Mass. 580.

5. No question has been raised as to the form in which relief shall be granted. At the argument it was agreed by the parties and a representative of the receiver of the partnership that the receiver had been present at or participated in the hearings before the master, and was bound by his report. He may be admitted as a party, if it seems necessary at the hearing upon the terms of the decree.

The decree dismissing the bill is reversed, and the form of the remedial decree to be entered in accordance with this opinion may be fixed in the Superior Court.

So ordered.

**JAMES L. KARRICK vs. BERTON O. WETMORE, administrator,
& another, assignee.**

Suffolk. November 13, 1911. — January 4, 1912.

Present: RUGG, C. J., HAMMOND, SHELDON, & DECOURCY, JJ.

Judgment, Final, Motion to vacate. Superior Court. Practice, Civil, Motion to vacate judgment, Dismissal for want of prosecution, Discontinuance. Review. Error.

A judgment of dismissal entered in due course in an action in the Superior Court, which was called and dismissed pursuant to a general order of that court to that effect applying to all cases in which no action has been taken within the year next preceding, is a final judgment within the meaning of R. L. c. 193, § 15, which requires that a petition to vacate a final judgment shall be filed within one year after the entry of such judgment.

Where, in an action which was dismissed under a general order of the Superior Court because nothing had been done therein within a year, it is shown by the records of that court that there had been proceedings in the action within the year next preceding the judgment of dismissal but it does not appear that there had been any clerical error in the entry of that judgment, this does not give the Superior Court jurisdiction to grant a motion to vacate the judgment filed more than one year after the judgment was entered, the court having had jurisdiction to make the judgment of dismissal although the facts as afterwards shown did not warrant it.

A petition for a writ of review of a judgment of the Superior Court, which was discontinued by the petitioner by leave of court without costs before any trial was had upon it, does not estop the petitioner from maintaining a petition for a writ of error to reverse the same judgment upon substantially the same grounds as those alleged in his petition for a writ of review.

RUGG, C. J. This is a petition for a writ of error. The material facts are that an action by the intestate of the defendant in error Wetmore was brought against the plaintiff in error in the Superior Court in Suffolk County. A verdict was rendered against the plaintiff in error, the defendant in that action. Subsequently, on July 27, 1898, his exceptions were disallowed as not conformable to the truth. On June 12, 1899, the case was called and dismissed pursuant to a general order of the Superior Court to that effect applying to all cases in which no action had been taken within the year next preceding. Action had been taken in the case as above stated, but notwithstanding that, judgment of dismissal was entered on the first Monday of July, 1899, under the general rule of that court requiring judgment to be so entered in all cases ripe for judgment. More than fifteen

months later, on October 18, 1900, on motion, by order of the Superior Court, "said dismissal is stricken off, the same having been improvidently entered, and action having been taken within the year but not discovered." Thereafter judgment was entered on the verdict against the defendant there, the present plaintiff in error, he being then a non-resident. The present writ of error is brought to reverse this judgment.

I. The judgment of dismissal of July, 1899, entered under the general rule after a calling of the list, was a final judgment in the case. After the expiration of one year thereafter the Superior Court had no power to vacate that judgment and bring it forward for other action. These points were decided in *Pierce v. Lamper*, 141 Mass. 20; *Radclyffe v. Barton*, 154 Mass. 157; *Davis v. National Life Ins. Co.* 187 Mass. 468. See *Wetmore v. Karriek*, 205 U. S. 141, 150, and *Patch v. Wabash Railroad*, 207 U. S. 277, 281. R. L. c. 193, § 15. This being so, it is not necessary to consider whether there was evidence of notice to the present plaintiff in error of the motion to strike out the dismissal, for it is not claimed that he assented to such action.

II. The defendant seeks to avoid the force of these decisions on two grounds: (1) because the action dismissing the case at the calling of the list in June, 1899, and the entry of the judgment in July, 1899, were mistakes, and (2) because the case could not under the law have been dismissed and judgment of dismissal entered.

1. The power of a court to correct clerical errors in its records arising from misprision of the clerk, improvidence of jurors, failure of commissioners to express their decision or otherwise is ample. *Capen v. Stoughton*, 16 Gray, 364. *Lucy v. Dowling*, 114 Mass. 92. *Fitchburg v. Fitchburg Railroad*, 180 Mass. 535. *Whitney v. Commonwealth*, 190 Mass. 531, 540. But no clerical error appears here. There is no doubt that the docket memorandum of dismissal, minuted as the case was called, was made intentionally, although it might not have been made if the whole record respecting the case had been in the mind of the court. But that which was done was intended to be done, and the entry of judgment of dismissal in July, 1899, was the exact entry intended to be made. There was no clerical error. There was

no failure to make the written record correspond with the decision actually made.

2. The facts as they now appear did not authorize the action of the court in June, 1899, in dismissing the case nor in entering judgment in the following July. But such action was within the jurisdiction of the court. That it was done is attested by the records. The record of the clerk imports verity in this regard. That there were facts in existence which made it error as matter of law to enter the particular judgment is nothing more than happens in many instances where judgments of lower courts are reversed. There were ample remedies at hand, if seasonably taken, to protect the plaintiff. Perhaps he might have appealed; he certainly might have petitioned for relief through one of the channels afforded by the statutes. R. L. c. 193. *Davis v. National Life Ins. Co.* 187 Mass. 468. He did none of these until long after the time limited by law. It follows that the Superior Court was without jurisdiction to entertain the motion filed in October, 1900, and that its subsequent action in the case likewise was void.

3. In October, 1902, the plaintiff in error filed in the Superior Court a petition for a writ of review of the judgment which is the subject matter of the present petition, and the grounds therein alleged were substantially the same as those in this proceeding. By leave of court that petition was afterwards discontinued by the petitioner without costs. It does not appear that trial thereupon had been commenced. These circumstances do not estop the petitioner from asserting his rights by this form of remedy.

Judgment reversed.

A. E. Burr, for the plaintiff in error.

H. T. Richardson, for the defendant in error John F. McKay, the assignee of the judgment sought to be reversed.

ADELINE R. COMSTOCK, executrix, vs. WILLIAM E.
LIVINGSTON.

Middlesex. November 14, 1911. — January 4, 1912.

Present: RUGG, C. J., HAMMOND, SHELDON, & DECOURCY, JJ.

Pleading, Civil, Replication. Practice, Civil, Order to strike out replication, Requests for rulings, Exceptions. Fraud, Evidence of intention, Fiduciary relation. Evidence, Of fraud, Of intention.

In an action on a promissory note, where the defense set up in the answer was a release under seal given by the plaintiff to the defendant, the plaintiff filed a replication alleging in substance that the release set up in the defendant's answer was procured from the plaintiff by fraud on the part of the defendant. The presiding judge ordered that the replication should be stricken out. *Held*, that under R. L. c. 173, §§ 31, 32, the presiding judge did not exceed his power in ordering the replication stricken out, it being open to the plaintiff in an action at law to prove that the release was obtained by fraud without filing a replication.

No exception lies to the refusal of the judge presiding at the trial of an action at law to refuse to make rulings upon requests presented before the introduction of any evidence.

In an action on a promissory note, where the only defense is a release under seal given by the plaintiff to the defendant, and the plaintiff offers to show that the release was procured from her by fraud on the part of the defendant, the plaintiff may show that she was induced to sign the release by a promise of the defendant, that when his sister should die, whereby he would come into a large property, he would pay the note held by the plaintiff, notwithstanding the release, and that at the time the defendant made this promise he did not intend to keep it.

In an action by an executor on a promissory note, where the only defense was a release under seal given by the plaintiff's testatrix to the defendant and the plaintiff contended and offered to show that the release was procured from his testatrix by fraud on the part of the defendant, the plaintiff excepted to a ruling of the presiding judge that there was no evidence that the defendant was a trusted and confidential adviser of the plaintiff's testatrix. The only evidence which tended to show anything beyond a business relation between the parties coupled with great confidence of the plaintiff's testatrix in the defendant was the testimony of one witness that the plaintiff's testatrix in the absence of the defendant said to her, "My husband told me before he died, if I was in trouble or needed advice to always call on [the defendant], and always to do as he told me." There was nothing to show that this advice to the plaintiff's testatrix was known to the defendant or that the plaintiff's testatrix ever by word or conduct gave the defendant to understand that she relied on him for counsel in the matter of the release or any other matter. *Held*, that the ruling of the judge was correct.

In an action by an executor on a promissory note, where the only defense is a release under seal given by the plaintiff's testatrix to the defendant and the plaintiff contends and offers to show that the release was procured by fraud on the part of the defendant, the plaintiff may show, if the presiding judge makes the preliminary findings required by R. L. c. 175, § 66, that the testatrix said to a

witness, referring to the release, that the defendant "made her think that it would be all right and she thought it would be," this being admissible only as bearing upon the influence exerted upon the mind of the plaintiff's testatrix by that which the defendant said.

RUGG, C. J. 1. This is an action of contract upon a promissory note. The answer pleaded a release under seal by the payee (the plaintiff's testatrix) to the maker (the defendant) and a general denial. Thereafter the plaintiff filed a long replication setting up various matters. The substance of it all was that the signature of the payee to the release had been procured by the fraud of the defendant, by an abuse of a relation of trust and confidence which existed between them, by weakness and feebleness of the payee and her inability to withstand the maker's persuasion, and that the release was executed in reliance upon a promise by the defendant to pay the note upon the happening of an event in the future, which event has happened, and a demand and refusal, and also a further promise by the defendant to pay in return for a delay in asserting this obligation. The replication was stricken out by order of the court.* It is sought to sustain exception to this action on the strength of R. L. c. 173, §§ 31, 32, which allow a plaintiff to reply to a defense set up in the answer "any facts which would in equity avoid such defence or which would entitle the plaintiff to be absolutely and unconditionally relieved in equity against such defence." This language means such a state of facts as in equity and not at law would entitle a party to relief. It has no application to a case where the facts alleged afford as full relief in the action at law and as they would in equity. No special equitable relief was asked for in the replication, and the facts stated therein do not appear to warrant the asking of any. So far as they relate to the cause of action set up in the declaration, they were as competent in favor of the plaintiff without a replication as with it. *Twomey v. Linnehan*, 161 Mass. 91, 94. *Corbett v. Craven*, 196 Mass. 319. So far as they refer to another cause of action they are not the proper subject matter for a replication. Ordinarily, no further pleadings are required after the answer in an action at law except upon motion of the defendant, and the court did not exceed

* In the Superior Court the case was tried before *Hardy, J.*, who at the close of the plaintiff's case ordered a verdict for the defendant. The plaintiff alleged exceptions.

its power in ordering this replication stricken out. *Lyon v. Manning*, 133 Mass. 489.

2. The plaintiff presented certain requests for rulings before the introduction of any evidence. They were refused rightly, for such practice is wholly irregular. *Wood v. Skelley*, 196 Mass. 114, 118. The soundness and applicability of the requests need not be considered.

3. The plaintiff offered to prove, in substance, that there were relations of trust and confidence between the maker and payee, and that the latter was weak and feeble and liable to be easily persuaded, and that with knowledge of these infirmities the defendant induced the signing of the release by promising her that when his sister, a Mrs. George, should die, whereby he would come into possession of a large property, he then would pay the note, at the time intending not to keep the promise. We construe the ruling of the Superior Court to mean that evidence respecting all these matters was competent, except that of the promise to pay the note out of such moneys as he might receive from Mrs. George and of his intent not to keep that promise. It is to be noted that the question here raised is whether the execution of the release, upon which defense to the action is based, was induced by the fraud or misrepresentation of the defendant. It is not an action for deceit. See *Derry v. Peek*, 14 App. Cas. 337, 360; *Nash v. Minnesota Title Ins. & Trust Co.* 163 Mass. 574. The defendant is liable upon the note unless he is relieved by the release. The question upon this branch of the case is whether the evidence proffered and excluded was sufficient to warrant a finding that the execution of the release was procured by the misrepresentation or fraud of the defendant. In several cases it has been said that a representation of the existence of a present intent to do an act in the future, when such intent does not exist and the maker of the representation knows it does not exist, is a misrepresentation of a material fact. This question was not decided in *Commonwealth v. Althause*, 207 Mass. 32, 47, 48, for that was an indictment where the procurement of property by false pretenses was involved. But the authorities there reviewed in detail, with ample excerpts from opinions, which it is not necessary to repeat here, establish the fraudulent character of such representations. *Commonwealth v. Walker*, 108 Mass. 309, 312.

Edgington v. Fitzmaurice, 24 Ch. D. 459. *Swift v. Rounds*, 19 R. I. 527. *Commonwealth v. Eastman*, 1 Cush. 189, 221. It has been held frequently that the purchase of goods with the preconceived intent not to pay for them is such a fraud upon the vendor as enables him to avoid the contract. *Watson v. Silsby*, 166 Mass. 57, and cases cited. *McCusker v. Geiger*, 195 Mass. 46, 54. There is no distinction in principle between these cases and the case at bar. The procurement of the execution of a release, which if binding relieves the person to whom it runs of onerous financial obligation, by the making of promises which the promisor then intends not to perform, is as distinctly a fraud upon the promisee as is the purchase of goods with the purpose not to pay for them upon a vendor of chattels. The existence of such an intent under the circumstances here disclosed may be difficult of proof. But if it is established by evidence, it should be given its legal effect of abrogating the effect of the release, provided the payee of the note was misled into signing the release in reliance upon the false promise of the defendant to pay the note, notwithstanding the release, out of the property he might receive from the estate of Mrs. George.

4. The ruling that there was not evidence sufficient to show that the defendant was a trusted and confidential adviser of the payee of the note was correct. Mere respect for the judgment of another or trust in his character is not enough to constitute such a relation. There must be such circumstances as indicate a just foundation for a belief that in giving advice or presenting arguments one is acting not in his own behalf, but in the interests of the other party. If the relation is a business one, the existence of the mutual respect and confidence does not make it fiduciary. The only evidence which goes beyond mere business relations coupled with great confidence was the testimony of a single witness that the plaintiff's testatrix in the absence of the defendant said to her, "My husband told me before he died, if I was in trouble or needed advice to always call on William E. Livingstone [the defendant], and always to do as he told me." But there was nothing to show that this admonition was known to the defendant or that the deceased ever by word or conduct gave the defendant to understand that she relied on him for counsel in this or any other matter.

5. If at the new trial there is any evidence of fraudulent representations by the defendant, then the testimony of the witness, Adeline R. Comstock, that the testatrix said to her respecting the release that the defendant "made her think it would be all right and she thought it would be" will be admissible (provided the court makes the preliminary finding of fact required by R. L. c. 175, § 66) solely as bearing upon the influence exerted upon the mind of the testatrix by that which the defendant said. *Knight v. Peacock*, 116 Mass. 362. *Toole v. Crafts*, 193 Mass. 110, 112.

Exceptions sustained.

W. H. Bent, for the plaintiff.

F. N. Wier, (*L. T. Trull* with him,) for the defendant.

ADELAIDE P. FARRIS, administratrix, vs. BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. November 14, 15, 1911. — January 4, 1912.

Present: RUGG, C. J., HAMMOND, SHELDON, & DECOURCY, JJ. 214-163
215-557
✓ 223-533-
236-174
244-420, 421
251-108

Negligence, In use of highway, Street railway. *Evidence*, Estimate of distance, Admissions and confessions.

If one, who is driving with a horse and buggy in a city from an intersecting street into a street on which are parallel tracks of a street railway running straight for more than a quarter of a mile, sees a car approaching on the nearer track more than one hundred and fifty feet away, and, thinking that he has time to get across, proceeds to cross the tracks with his horse "trotting or walking or jogging," and if the car, which is coming at an unreasonable rate of speed, strikes the rear part of his buggy, it cannot be said as matter of law that he necessarily was negligent in attempting to cross, he not being bound to apprehend an unreasonable rate of speed of the car.

In an action by an administrator against a corporation operating a street railway for personal injuries sustained by the plaintiff's intestate from the collision of a car of the defendant with a buggy in which the intestate was driving, if there is evidence that the plaintiff's intestate, coming from an intersecting street, saw the car more than one hundred and fifty feet away approaching on a clear straight track and thought that he had time to cross in front of it but that the car coming at an unreasonable rate of speed struck the rear of the intestate's buggy, the testimony of an eyewitness, called by the plaintiff, that in his judgment the car was only twenty feet away when the horse of the plaintiff's intestate was driven from a place of safety into a place of danger, is not to be treated as an admission

of the plaintiff's intestate or of the plaintiff, but merely as an estimate of distance by a witness, which is to be considered by the jury with the other evidence.

TOBT, by the administratrix of the estate of Benjamin W. Farris, for personal injuries sustained by the plaintiff's intestate at about 5.30 o'clock P. M. on December 31, 1908, from being run into by an electric car of the defendant, while he was attempting to drive across Columbus Avenue in Boston, as described in the opinion. Writ dated October 19, 1909.

In the Superior Court the case was tried before *Sherman, J.* The evidence is described in the opinion. At the close of the evidence the defendant asked the judge to rule that upon all the evidence the plaintiff was not entitled to recover. The judge refused to make this ruling and submitted the case to the jury, with certain special questions to which the jury returned the answers which are stated in the opinion. The jury returned a general verdict for the plaintiff in the sum of \$3,000; and the defendant alleged exceptions.

E. P. Saltonstall, for the defendant.

G. H. Mellen, (*C. R. Darling* with him,) for the plaintiff.

RUGG, C. J. This is an action for personal injuries received by the plaintiff's intestate while travelling with a horse and buggy on a public way in the evening, through collision with a car of the defendant. There was evidence tending to show that the accident occurred in Boston, on Columbus Avenue, which at this point was straight for more than a quarter of a mile and was about fifty-three feet wide between curbstones. Two tracks of the defendant ran in the middle part of the street. The plaintiff's intestate drove out of Davenport Street, which intersects Columbus Avenue on its easterly side, into Columbus Avenue, intending to cross the tracks to the westerly side of the street in order to go southerly on the avenue. There was a block of buildings on the southerly corner of Columbus Avenue and Davenport Streets, the distance from which to the nearest rail of the defendant was fifty feet, and as soon as the intestate could see past this block he looked up and down the street for cars and saw one approaching on the track nearer to him going northerly, but "beyond Benton Street," a street one hundred and fifty feet from Davenport Street. There was testimony that

he said that he saw "the car was not a dangerous distance," and also that as he was coming from Davenport Street "he saw a car way up the street and as he thought he had plenty of time to pass as the car was quite a distance." Other testimony was that the car was seventy-five yards away at that time.

The only evidence as to the speed of the horse was that it was either trotting or walking or jogging, but the driver did not urge it onward. There was no other car in sight and there was no traffic in the street except one wagon some distance away. The car struck the buggy on "the rear end," overturning it and injuring the plaintiff's intestate. There was a regulation of the board of aldermen of the city of Boston to the effect that "in approaching any public or private way intersecting that in which the railway is located the speed of the car must be reduced to such a rate as will make it possible to stop it immediately."

The jury found in answer to questions that the plaintiff's intestate was in the exercise of due care; that the gong was sounded before the accident; and that the car before the accident was being run at a reckless or unreasonable rate of speed.

The only question is whether as matter of law it can be said that the plaintiff's intestate was not in the exercise of due care at the time of the accident. Generally when a collision occurs between a street car and a horse-drawn vehicle at intersecting streets the question of due care of the driver of each is for the jury. Neither has an exclusive right to which the other must yield. Both have the rights and duties of travellers upon a common thoroughfare. The driver of the car, being limited to the tracks, while the driver of the horse-drawn vehicle has the freedom of the entire street, may anticipate that there will be no unreasonable obstruction of his narrow pathway. He has no right to expect that it will be wholly unimpeded. The distance of the car, when the plaintiff's intestate came in sight of it, is not proved to a certainty. It was "beyond" one hundred and fifty feet, but how much beyond is not clear. It must now be taken as a fact that the car was coming at an unreasonable rate of speed. The plaintiff's intestate thought he had time to get across. Evidence to that effect was admitted without objection and has been treated as entitled to consideration. *Jedfrey v. Boston & Northern Street Railway*, 198 Mass. 232. That his

judgment was not reckless is shown by the fact that it was the rear part of his wagon that was struck. A slight abatement of the unreasonable rate of speed, at which the jury found the car was going, might have averted the injury. It cannot be said that the deceased was bound to apprehend an unreasonable rate of speed by the car. Although the case is close and reaches almost to the verge, we incline to the view that there was evidence enough to take it to the jury, and that it is governed by *Halloran v. Worcester Consolidated Street Railway*, 192 Mass. 104; *Sellon v. Boston Elevated Railway*, 208 Mass. 507; *Mullen v. Boston Elevated Railway*, 209 Mass. 79, and like cases rather than by *Cokinos v. Boston Elevated Railway*, 209 Mass. 225, *Tognazzi v. Milford & Uxbridge Street Railway*, 201 Mass. 7, and *Dunn v. Old Colony Street Railway*, 186 Mass. 816.

The defendant in argument has relied strongly on the testimony of one eyewitness called by the plaintiff, that in his judgment the car was only twenty feet away when the horse left a place of safety and went into a place of danger. If this was the fact under the other conditions disclosed, the lack of due care of the decedent would have been plain. But this was not an admission by the decedent or by the plaintiff. It was simply an estimate of distance by a witness which the jury in view of their verdict must have regarded as accurate. It appears to have been contradicted by evidence as to the place of impact by the car upon the buggy.

Exceptions overruled.

WARREN C. BLAKE, executor, vs. FLORENCE M. ROGERS.

Middlesex. November 15, 1911. — January 4, 1912.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DECOURCY, JJ.

Execution, Sale, Officer's return. Evidence, Presumptions and burden of proof, Extrinsic affecting officer's return. Land Court, Appeal. Words, "Published," "Printed."

While the proceedings incident to a sale of real estate after a levy of an execution thereon must conform to the requirements of R. L. c. 178, § 28, the fact that such requirements have been observed may be proved by the execution with the return thereon of the officer who made the sale, if such return in substance

and with certainty shows compliance with the statutory requirements although it contains verbal departures from the wording of the statute.

The following return of an officer who, having levied upon real estate in the town of Framingham under an execution describing the debtors as "of Boston," had sold the property at an execution sale, is evidence tending to show compliance with all requirements of R. L. c. 178, §§ 28, 44: "By virtue of this execution, I . . . gave notice of the time and place of sale to the [judgment debtors] by sending to their address in Boston, prepaid by registered letters, each a copy of said notice, the said [judgment debtors] not residing within my precinct and not being found by me therein, and caused notifications thereof to be posted up in the following public places, to wit [naming them] and afterward caused an advertisement of the time and place of sale to be published three weeks successively before said sale in the Marlboro' Times, a newspaper printed in Marlborough in said county."

The meaning of the requirement of R. L. c. 178, § 28, that the publication of the notice of the time and place of an execution sale of real estate shall be in a "newspaper, if any, published in the county in which the land lies," is that such newspaper shall be printed and issued within the county; and therefore a return of the officer making such a sale, that he "published" notice thereof in a newspaper "printed" in the county, sufficiently shows compliance with the above requirement of the statute.

Extrinsic evidence is not admissible to contradict or control the return upon an execution of an officer who was authorized to act under the execution.

A report of a decision of a judge of the Land Court, filed by him in the Superior Court on an appeal from his decision while St. 1905, c. 288, which provided that on an appeal from the Land Court the judge who rendered the decision should file in the Superior Court "a full report of his decision of the facts found by him," which should "be *prima facie* evidence as to the matters therein contained," was in force, has no value as evidence if it contains only a ruling of law.

WRIT OF ENTRY to recover possession of certain land on Pratt Street in that part of the town of Framingham called South Framingham. Writ dated February 5, 1909.

In the Land Court the case was heard by *Clark, J.*, who, on December 30, 1909, filed the following memorandum:

"The demandant to show his title introduced a sheriff's deed, dated May 12, 1909, recorded September 1st, 1909, purporting to convey to him, the demandant, all the right, title and interest which George W. and Alice H. Cutler, or either of them, had in the demanded premises on the 28rd day of March, 1909. He offered no evidence of the truth of the recitals contained in said deed nor did he offer evidence to show that said Cutlers, or either of them, had any right, title or interest in the demanded premises on said 28rd day of March, 1909, or at any other time. I ruled therefore at the request of the tenant that the demandant was not entitled to recover. Judgment for the tenant."

The demandant appealed to the Superior Court, where the case was tried before Fox, J., upon issues, as to only one of which there was any dispute between the parties, namely, whether the recitals contained in the sheriff's deed hereinafter described were true.

The demandant, to prove his title, relied upon a sheriff's deed. No question was raised as to the execution and delivery of the deed or the title of the execution debtor or the identity of the land demanded with that described in the deed. A certified copy of the execution under which the alleged sale was made was introduced in evidence, and also, subject to an exception of the tenant, a certified copy of the officer's return thereon and of amendments to the return. The judgment debtors were described in the execution as "George W. Cutler and Alice H. Cutler of Boston in the county of Suffolk." Material portions of the return as amended were as follows:

"Middlesex, ss.

March 23rd, A. D. 1909.

"By virtue of this Execution, I this day at three o'clock in the afternoon seized and took as the property of the within named Judgment Debtors George W. Cutler and Alice H. Cutler or either of them all the right, title and interest which they or either of them have in and to the following described parcel of real estate the record title of which stands in the name of Florence M. Rogers, to wit . . . [here followed a description of the land in controversy] . . . and afterward within three days I deposited an attested copy of this Execution with so much of my return thereon as relates to said taking into the office of the Registry of Deeds, at Cambridge within and for the southern district of the county of Middlesex, and on the twenty-sixth day of said March being thirty days before the time appointed for the sale hereinafter mentioned I gave notice of the time and place of sale to the said George W. Cutler and Alice H. Cutler by sending to their address in Boston, prepaid by registered letters, each a copy of said notice,* [the said George W. Cutler and Alice H. Cutler not residing within my precinct and not being found by me therein] and caused notifications thereof

* These words in brackets were added by an amendment allowed "*nunc pro tunc* as of the date of officer's return."

to be posted up in the following public places, to wit: at the Post Office in South Framingham being the Town where said land lies and at the Post Office in Natick and at the Post Office in Marlborough and adjoining Town and City and afterward caused an advertisement of the time and place of sale, to be published three weeks successively before said sale, in the Marlboro Times, a newspaper printed in Marlborough in said County, to wit on the eighth, fifteenth and twenty second day of April 1909 and on the eighth day of May 1909 at eleven o'clock in the forenoon at the premises above described, the time and place appointed for said sale as aforesaid, I sold the said right, title, and interest, by public auction to Warren C. Blake Executor, as within named, who bid therefor the sum of twenty-five hundred dollars, which was the highest bid made therefore and I have made executed acknowledged and delivered to the said Warren C. Blake Executor, a good and sufficient deed of said right, title and interest . . . [here followed a statement as to the application of the amount received from the purchaser] . . . Chas. G. Whitman, deputy sheriff." The return was sworn to before an assistant clerk of courts.

The objections of the tenant to the admission of the return in evidence were that the return "did not sufficiently set forth . . . (1) that written notice had been given to the debtors, (2) that a copy of said written notice had been mailed and addressed to the debtors at their residence as described in the execution, (3) that a notice of said sale had been posted, (4) that a notice of said sale had been published, (5) that a notice of said sale was published in a newspaper in Middlesex County."

The tenant offered in evidence the report of the judge of the Land Court set out above, and, both parties having rested, asked the presiding judge to rule that there was "no evidence to support the truth of the recitals in the deed of the sheriff." The ruling was refused.

The presiding judge instructed the jury in substance that through the return on the execution the demandant had offered evidence of the steps taken in making the title, and that evidence had been offered tending to show that the recitals in that return were true and that no evidence had been offered to the contrary on that point, and therefore that they were warranted in bringing

in answers favorable to the demandant on the issues. The jury found accordingly; and the tenant alleged exceptions.

The case was submitted on briefs.

J. P. Dexter, for the tenant.

C. F. Choate, J. L. Hall & R. A. Stewart, for the demandant.

BRALEY, J. The execution with the amended return making it conformable to the truth was admissible to prove the recitals in the sheriff's deed under which the demandant claimed title to the premises. *Childs v. Barrows*, 9 Met. 413. *Sawyer v. Harmon*, 186 Mass. 414. *Hunneman v. Phelps*, 207 Mass. 489. But unless it appeared therefrom, that in making the levy and sale, the requirements of the statute had been followed, the judgment debtors had not been divested of their estate. *Rand v. Cutler*, 155 Mass. 451, 458. By R. L. c. 178, § 28, a notice of the time and place of sale must be posted in the city or town where the land lies, and in two adjoining cities or towns if there are so many in the county, and, the debtors having been described in the execution as residing in another county, it was also necessary under § 44 to send by mail, postpaid and addressed to each of them at their residence as described in the execution, a written or printed notice of the sale. R. L. c. 8, § 5, cl. 25. It is the purpose of the statute, that the debtor shall be notified in order that he may fully protect his interests at the auction, or prevent the sale by payment of the judgment with accrued costs.

The proceedings indeed must conform to the statute, but no set form of words is prescribed by which compliance must be manifested. The errors relied on by the tenant as to the posting of the notice and service upon the defendants go rather to the form of expression used by the levying officer than to the substance of the statute, and the verbal departures in the return from the literal wording of the statute do not affect the truth of the recitals of what had been done, and in these particulars the statements show with sufficient certainty, that he acted in conformity with it. *Owen v. Neveau*, 128 Mass. 427. *Sawyer v. Harmon*, 186 Mass. 414, 415. *Holmes v. Jordan*, 163 Mass. 147, 148, 149.

"The officer shall also cause a notice of the time and place of sale to be published three weeks successively before the sale in a newspaper, if any, published in the county in which the land

lies." R. L. c. 178, § 28. If the use of the word "advertisement" in the return, instead of "notice," when referring to the act of publication was not a fatal variance for reasons already given, the tenant urges, that because the return further states, that the sale was published in a newspaper "printed" in the county, the statute was violated and the levy was fatally defective. The time and place of sale are to be made known and advertised to the community for the purpose of attracting purchasers and to prevent secret and collusive transfers to the injury of the debtor or of other attaching creditors or of incumbrancers. A newspaper which merely circulates within the county, although it might be an effectual medium of publicity, is not within the statute, if there be a newspaper "published in the county in which the land lies." The Legislature has not defined the sense in which the word is here used, but it is to be construed according to the common and approved usage of the language. R. L. c. 8, § 4, cl. 8. Obviously it refers to its local habitation and the notice must be inserted in a newspaper printed and issued within the county. In ordinary signification the phrase "published and printed" when used in connection with books, magazines and newspapers bearing the imprint of a town or city denotes the place where the press work is done and the publication is issued. *Bayer v. Hoboken*, 15 Vroom, 181; *S. C. 16 Vroom*, 185. *State v. Bass*, 97 Maine, 484. It is thus defined in R. L. c. 18, § 1, now St. 1909, c. 490, Part II, § 1, requiring collectors of taxes to give notice of the time and place of sale of land for payment of taxes by publication. "Publication . . . shall mean the act of printing . . . in a newspaper published in the city or town, if any, otherwise in the county, where the land or other property . . . is situated." *Connors v. Lowell*, 209 Mass. 111, 119. Our previous statutes relating to the seizure and sale of lands on execution when examined confirm this interpretation. The original act of 1798, c. 77, §§ 3, 4, providing for the attachment and sale of an equity of redemption which was re-enacted without material change in phraseology in Rev. Sts. c. 73, § 89, Gen. Sts. c. 103, § 41, and the Pub. Sts. c. 172, § 29, required, that "an advertisement of the time and place of sale, to be published . . . in some public newspaper, printed in the county in which such real estate lies, if any such newspaper shall be there printed." The R. L. c. 178, § 28, with

the exception that "published" is substituted for "printed," made no change, and if susceptible of more than one construction it should be construed with the preceding statutes of which it is not a repeal, but a re-enactment. R. L. c. 226, § 2. *Bent v. Hubbardston*, 138 Mass. 99, 100. *Franks v. Edinberg*, 185 Mass. 49, 53.

The return leaves nothing to be inferred as to the steps taken. It specifically and aptly recites, that in the mode prescribed the time and place of sale were published in a newspaper printed in the county, and on the face of the record no error is disclosed.

The essential elements of a valid sale having been put in evidence, the judge properly declined to give the tenant's request, that the truth of the recitals in the sheriff's deed had not been shown. *Welsh v. Joy*, 18 Pick. 477.

The jury also were correctly instructed, that the evidence, if believed, warranted an affirmative answer to the second issue which raised the only questions presented by the exceptions. It is settled, that extrinsic evidence was not admissible to contradict or control the return on the execution. *Sykes v. Keating*, 118 Mass. 517, 520. And the decision of the associate judge of the Land Court moreover having contained no findings of fact, but only a ruling of law, it had no evidentiary value under St. 1905, c. 288. *DePonta v. Driscoll*, 200 Mass. 225, 226.

Exceptions overruled.

GEORGE W. CARNRICK vs. LIQUOZONE COMPANY.

Norfolk. November 21, 1911. — January 4, 1912.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DECOURCY, JJ.

Contract, Construction, Performance and breach.

A manufacturer of bottles received and accepted in writing the following order from a customer: "You may enter our order for our entire supply of . . . bottles, from August 1, 1904, to January 1, 1906, . . . [at a certain price] . . . We agree to advise you two months in advance of our requirements." The customer never notified the manufacturer two months in advance of his requirements, but with the customer's knowledge the manufacturer made frequent

visits to the customer's place of business for the purpose of keeping in touch with his needs, and manufactured and kept on hand a reserve supply of bottles for the purpose of filling the customer's orders as they were given. At the end of the period of the contract the manufacturer had on hand a large supply of bottles as to which the customer had given no notice that he would require them and no orders, and sought to compel the customer to pay therefor. *Held*, that, the manufacturer having made the surplus without an order or notice from the customer, the customer was not liable therefor under the terms of the contract.

CONTRACT for an alleged breach of the contract set out in the opinion, the plaintiff alleging in substance that the Cumberland Glass Manufacturing Company, his assignor, pursuant to the terms of the contract, beside 60,000 gross of bottles which were delivered to and accepted by the defendant, had manufactured 9,729 gross, which it offered to deliver to the defendant but which the defendant refused to receive. The plaintiff claimed the contract price of the manufactured bottles. Writ dated June 10, 1905.

The case was referred to Carleton Hunneman, Esquire, as auditor, who filed a report containing findings for the defendant.

In the Superior Court the case was tried before *Morton*, J. There was evidence that the vice-president of the Cumberland Glass Manufacturing Company made frequent trips to the defendant's place of business for the purpose of keeping in touch with the defendant's needs as to bottles. There was controverted evidence on the question, whether the 9,729 gross of bottles, the contract price of which the plaintiff was seeking to recover, ever were ordered from the plaintiff's assignor by the defendant, and the jury were instructed: "The plaintiff can hold the defendant responsible for an excess supply which it has on hand only when such excess was manufactured as a result of some act or word of the defendant, so definite as reasonably to constitute an order and warrant the manufacture. That is the sole question in this case for the jury."

With regard to the plaintiff's assignor manufacturing a reserve supply of the bottles without orders from the defendant, but in anticipation of orders, the judge also instructed the jury as follows: "If the plaintiff chose to manufacture and keep on hand a reserve supply of bottles so as to be ready to fill orders, it could not hold the defendant responsible for that surplus except so far

as the surplus was manufactured in reliance upon some act or written or spoken word of the defendant, and some act or word so definite that the plaintiff could fairly and reasonably rely upon it as an order. The plaintiff had the right to avail itself of the two months' provision in the contract, it had the right to say to the defendant, 'You must give us two months' written notice of what your requirements are.' That was put in for the benefit of the plaintiff, and if they had availed themselves of it and had obtained from the defendant a written notice two months in advance of what their requirements would be and had manufactured under that written notice, the number which the requirements indicated, the plaintiff could hold the defendant responsible for that number whether they were actually needed or not. It could, in other words, have secured a definite and conclusive statement of the requirements."

The following rulings, asked for by the plaintiff, were refused by the judge:

"1. The agreement between the parties was a supply contract under the terms of which the plaintiffs had a right to manufacture as many bottles as a reasonably prudent manufacturer would have manufactured for the use of the defendant at the rate they were using them and had the further right to compel the defendant to take them when manufactured or pay damages therefor in case of refusal.

"2. Under a supply contract such as involved in this case, the supplyee cannot suddenly discontinue ordering without taking such goods as the manufacturer, in the ordinary course of business, has in the exercise of reasonable judgment manufactured without being liable in damages."

"6. Upon all the evidence the jury may find the proviso of the contract in regard to giving two months' notice of requirements was waived by both parties."

Other facts are stated in the opinion.

The jury found for the defendant; and the plaintiff alleged exceptions.

H. W. Ogden, for the plaintiff.

E. F. McClennen, for the defendant.

RUGG, C. J. This is an action for breach of a written contract of the following tenor:

"February 18, 1904.

"Messrs. The Cumberland Glass Mfg. Co.,
Bridgeton, N. J.

"Gentlemen: You may enter our order for our entire supply of Amber bottles, from Aug. 1st, 1904, to Jan. 1st, 1905. The 8 oz. lettered, 6½ oz. weight, at \$2.52 per gross, and the 20 oz. lettered, 18 oz. weight, at \$4.18 per gross.

"We agree to advise you two months in advance of our requirements. These goods are to be sent freight prepaid, in car lots.

"We further agree to take the balance of our old contract of 40 M gross by Aug. 1st.

"This order is contingent on fires, strikes or accidents beyond our control.

"Yours very truly,

"The Liquid Ozone.

S. B. Scidmore, Mgr.

"Accepted.

"Cumberland Glass Mfg. Co.

By Richard M. More."

The plaintiff is assignee of the rights of the Cumberland Glass Manufacturing Company under the contract. The latter will be referred to as the plaintiff.

A principal contention of the plaintiff at the trial was that this was a "supply contract" so called, of such a nature as required the plaintiff to furnish the bottles needed by the defendant during the contract period and bound the defendant to take from the plaintiff, not only such as it needed, but also such "as the plaintiff had reasonable ground to believe the necessities of the business might require." It is not necessary to define the duties and obligations of the respective parties to a general and unqualified contract to furnish goods needed during a specified period, for the reason that the contract at bar contained a clause governing that particular. In it was a stipulation requiring the defendant to give two months' notice of its requirements. This provision gave to the plaintiff plain and ample protection as to the quantity which it might be required to provide. Under such a contract the plaintiff would not be justified, except at its risk, in relying

upon its own judgment as to what might be ordered when under the terms of the contract it might secure an exact statement two months in advance of all that it would be asked to furnish. Although performance of the contract was not to begin until August, it was made in the preceding February. Hence there was sufficient time within which the plaintiff could procure the necessary advices of the defendant's requirements. Failure on the part of the plaintiff to avail itself of this protecting clause does not warrant it in holding the defendant responsible for its mistaken estimate made on its own responsibility of the probable demands of the defendant. The terms of the contract plainly show that the parties guarded against liability on the part of the plaintiff to supply goods ordered on short notice, and limited its full obligation to such as were indicated by the advance notice of requirements by the defendant. But this is the extent of its provision. The various requests based upon this aspect of the case were refused rightly, and no error appears in the portion of the charge excepted to. It follows that it was not error to exclude the opinion evidence proffered by the plaintiff as to the reasonable amount of bottles which the manufacturer would need to carry in stock in order to meet the requirements of the contract based upon information as to the volume of consumption by the defendant during earlier periods.

No harmful error appears in the charge touching waiver or in the court's refusal to give the plaintiff's requests upon that subject. The parties had been dealing with each other prior to August, 1904, under a written contract which provided only that the defendant should give "reasonable notice" of the shipments it might need. The stipulation in the contract under discussion called for a notice two months in advance. It was a requirement binding only upon the defendant. It called for no action by the plaintiff. In a sense it was, therefore, for the benefit of the plaintiff. It was the only party to waive its advantages. If it preferred to relinquish its right under this clause and rely upon other modes of obtaining the information, it might do so. But it cannot impose another and more onerous contract upon the defendant, merely because it has failed to insist upon performance of the one which was written. There was no contention that the contract as a whole had been abrogated.

All the exceptions which have been argued are disposed of by that which has been said. Others are treated as waived.

Exceptions overruled.

HENRY M. BAKER, executor, vs. CHARLES F. LIBBIE
& another.

241-241
251-2306

Suffolk. November 24, 1911. — January 4, 1912.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DECOURCY, JJ.

Equity Jurisdiction, To restrain publication of private letters. Letters.

Review by RUGG, C. J., of the authorities relating to the protection by courts of equity of the right of the author of an ordinary private letter, which is without value as literature, to restrain its publication.

The executor of the will of the author of friendly letters, which do not possess the qualities of literature and were written to a cousin about domestic and business affairs, referring to household matters, to health and to the work that the writer was doing, may maintain a suit in equity, to restrain the publication of such letters or their multiplication in any way in whole or in part, and to compel the holder of the letters to allow the plaintiff to make copies of them within a reasonable time; but he is not entitled to a decree restraining the sale and transfer of such letters as manuscripts.

BILL IN EQUITY, filed in the Superior Court on February 17, 1911, by the executor of the will of Mary Baker G. Eddy, late of Concord in the State of New Hampshire, against the members of a firm engaged in business in Boston as auctioneers of books and manuscripts, alleging that a number of private unpublished letters written by the plaintiff's testatrix had come into the possession of the defendants in the course of their business, that the defendants had advertised such letters for public sale in their auction rooms in Boston and already had printed and published material and substantial parts of the letters in their sale catalogue, that the catalogue was being distributed by the defendants, and would be further distributed to the persons in attendance at such auction and that portions of the letters also had been published in the newspapers of Boston, New York and other cities of the country; and praying that the defendants might be enjoined and restrained "from further printing, pub-

lishing, selling, circulating, or in any manner making public or showing said letters, or any of them, or any copy or copies, extract or extracts therefrom, or any of them, to any person or persons," and "from further circulating or distributing or making public in any manner copies of said catalogue containing extracts from any of said letters."

The case came on to be heard before *Richardson, J.*, who by agreement of the parties reserved and reported it, upon the bill and answer, and all questions of law therein, for determination by this court.

S. J. Elder, (*E. A. Whitman* & *W. A. Morse* with him,) for the plaintiff.

W. M. Prest & *F. B. Livingstone*, for the defendants, submitted a brief.

RUGG, C. J. The plaintiff as executor of the will of Mary Baker G. Eddy, the founder of "Christian Science" so called, seeks to restrain an auctioneer of manuscripts from publishing for advertising purposes and from selling certain autograph letters of his testatrix. These letters were written in her own hand by Mrs. Eddy, as is said, "during one of the most interesting periods of her career, that is, just after the first publication of her 'Science and Health with Key to the Scriptures,' in 1875. It is averred in the answer that the letters have no attribute of literature, but are merely friendly letters written to a cousin about domestic and business affairs. Extracts from the letters show that they refer to household matters, to health and to the work she was doing. The questions raised relate to the existence, extent and character of the proprietary right of the writer of private letters upon indifferent subjects not possessing the qualities of literature and to the degree of protection to be given in equity to such rights as are found to exist. These points have never been presented before for decision in this Commonwealth. The nearest approach was in *Tompkins v. Halleck*, 133 Mass. 82, where the rights of an author of a dramatic composition put upon the stage but not printed were protected against a rival presentation made possible by human memory (overruling upon this point the earlier case of *Keene v. Kimball*, 16 Gray, 545) and *Dodge Co. v. Construction Information Co.* 183 Mass. 62, where property rights in valuable commercial in-

formation distributed to subscribers in writing, in print, by telegraph or orally, were recognized and protected against use by a rival concern. Neither of these decisions touches at all closely the points involved in the case at bar.

The rights of the authors of letters of a private or business nature have been the subject of judicial determination in courts in England and this country for a period of at least one hundred and seventy years. The first English case was *Pope v. Curl*, 2 Atk. 341, which was in 1741. It was a suit by Alexander Pope to restrain the publication of letters written by him to Swift and others. In continuing an injunction Lord Chancellor Hardwicke, after remarking that no distinction could be drawn between letters and books or other learned works, said: "Another objection has been made . . . that where a man writes a letter, it is in the nature of a gift to the receiver. But I am of opinion that it is only a special property in the receiver, possibly the property of the paper may belong to him; but this does not give a license to any person whatsoever to publish them to the world, for at most the receiver has only a joint property with the writer. . . . It has been insisted . . . that this is a sort of work which does not come within the meaning of the act of Parliament [as to copyright], because it contains only letters on familiar subjects, and inquiries after the health of friends, and cannot properly be called a learned work. It is certain that no works have done more service to mankind, than those which have appeared in this shape, upon familiar subjects, and which perhaps were never intended to be published; and it is this makes them so valuable."

Thompson v. Stanhope, 2 Ambl. 737 (1774) was a suit by the executors of Lord Chesterfield to restrain the publication of his now famous letters to his son, which the widow of the latter proposed to print and sell. Some of these possessed literary merit of a high order. Lord Chancellor Apsley was "very clear" that an injunction should be granted, upon the authority of the foregoing decision and the somewhat kindred cases of *Forrester v. Waller*, cited 4 Burr. 2381, and *Webb v. Rose*, cited 4 Burr. 2380, where notes and conveyancer's draughts were held to be the literary property of the writer or his representatives, and *Duke of Queensberry v. Shebbeare*, 2 Eden, 329, where the publication

of a part of Lord Clarendon's History by a possessor of the manuscript was restrained.

Gee v. Pritchard, 2 Swanst. 402, 426, was decided by Lord Eldon in 1818. Letters apparently without literary or other special interest by the plaintiff to the son of her husband were the subject of the suit, and publication was restrained on the ground of the property right of the writer. In *Lytton v. Devey*, 54 L. J. (N. S.) Ch. 293, 295, it was said: "The property in the letters remains in the person to whom they are sent. The right to retain them remains in the person to whom the letters are sent; but the sender of the letters has still that kind of interest, if not property, in the letters that he has a right to restrain any use being made of the communication which he has made in the letters so sent by him." See also *Prince Albert v. Strange*, 2 DeG. & Sm. 652; *S. C.* 1 MacN. & G. 25, 43. This same principle was followed expressly in the Irish case of *Earl of Granard v. Dunkin*, 1 Ball & Beatty, 207, and in *Labouchere v. Hess*, 77 L. T. (N. S.) Ch. 559. There are several dicta to the same effect by great English judges. For example, Lord Campbell said in *Boosey v. Jefferys*, 6 Exch. 580, at 588, "A court of equity will grant an injunction to prevent the publication of a letter by a correspondent against the will of the writer. That is a recognition of property in the writer, although he has parted with the manuscript; since he wrote to enable his correspondent to know his sentiments, not to give them to the world." Lord Cairns said, respecting correspondence in *Hopkinson v. Burghley*, L. R. 2 Ch. 447, at 448: "The writer is supposed to intend that the receiver may use it for any lawful purpose, and it has been held that publication is not such a lawful purpose." See also *Jefferys v. Boosey*, 4 H. L. Cas. 815, 867, 962. The latest English case on the subject recognizes this as the well settled rule. *Philip v. Pennell*, [1907] 2 Ch. 577. In 1804 the Scottish court on the suit of his children interdicted the publication of manuscript letters of Robert Burns. *Cadell & Davies v. Stewart*, 1 Bell's Com. 116 n.

The earliest case in this country, *Denis v. Leclerc*, 1 Martin, (La.) 297, arose in 1811. A single letter of no literary pretension was there in question and its publication was enjoined, and the writer's property interest in the letter was distinctly upheld.

The question was elaborately discussed by Mr. Justice Story in *Folsom v. Marsh*, 2 Story, 100, 110, who held that "The author of any letter or letters, (and his representatives,) whether they are literary compositions, or familiar letters, or letters of business, possess the sole and exclusive copyright therein; and that no persons, neither those to whom they are addressed, nor other persons, have any right or authority, to publish the same upon their own account, or for their own benefit."

In *Bartlett v. Crittenden*, 5 McLean, 82, at 42, Mr. Justice McLean said: "Even the publication of private letters by the person to whom they were addressed, may be enjoined. This is done upon the ground that the writer has a right of property in his letters, and that they can only be used by the receiver for the purpose for which they were written."

In *Woolsey v. Judd*, 4 Duer, 379, the question was considered exhaustively, and all the earlier cases were reviewed. The conclusion was reached that the writer of even private letters of no literary value has such a proprietary interest as required a court of equity at his instance to prohibit their publication by the receiver.

Grigsby v. Breckinridge, 2 Bush, 480, decided that "the recipient of a private letter, sent without any reservation, express or implied" held "the general property, qualified only by the incidental right in the author to publish and prevent publication by the recipient, or any other person."

In *Barrett v. Fish*, 72 Vt. 18, at 20, it was said "that a court of equity will protect the right of property in such [private] letters, by enjoining their unauthorized publication." The same doctrine has been held, either expressly or by way of dictum, in *Dock v. Dock*, 180 Penn. St. 14, 22; *Rice v. Williams*, 82 Fed. Rep. 487; *Eyre v. Higbee*, 22 How. Pr. 198; *Palmer v. De Witt*, 47 N. Y. 582, 586.

Against these opinions are *Wetmore v. Scovell*, 8 Edw. Ch. 515, and *Hoyt v. Mackenzie*, 8 Barb. Ch. 820, decided respectively of Vice-Chancellor McCoun and Chancellor Walworth while sitting alone. They were criticised and overruled in *Woolsey v. Judd*, 4 Duer, 379, by a court of six judges. There are also certain doubtful dicta by a vice-chancellor in *Percival v. Phipps*, 2 V. & B. 19, 28, which are relied upon as asserting a somewhat similar view. But it is not necessary to discuss them in detail, for

this review of cases demonstrates that the weight of decisions by courts of great authority, speaking often through judges of high distinction for learning and ability, supports the conclusion that equity will afford injunctive relief to the author against the publication of his private letters upon commonplace subjects without regard to their literary merit or the popular attention or special curiosity aroused by them.

The same conclusion is reached on principle and apart from authority. It is generally recognized that one has a right to the fruits of his labor. This is equally true, whether the work be muscular or mental or both combined. Property in literary productions, before publication and while they rest in manuscript, is as plain as property in the game of the hunter or in the grain of the husbandman. The labor of composing letters for private and familiar correspondence may be trifling, or it may be severe, but it is none the less the result of an expenditure of thought and time. The market value of such an effort may be measured by the opinions of others, but the fact of property is not created thereby. A canvas upon which an obscure or unskilful painter has toiled does not cease to be property merely because by conventional standards it is valueless as a work of art. Few products of the intellect reveal individual characteristics more surely than familiar correspondence, entries in diaries or other unambitious writings. No sound distinction in this regard can be made between that which has literary merit and that which is without it. Such a distinction could not be drawn with any certainty. While extremes might be discovered, compositions near the dividing line would be subject to no fixed criterion at any given moment, and scarcely anything is more fluctuating than the literary taste of the general public. Even those counted as experts in literature differ widely in opinion both in the same and in successive generations as to the relative merits of different authors. The basic principle on which the right of the author is sustained even as to writings confessedly literature is not their literary quality, but the fact that they are the product of labor.

The existence of a right in the author over his letters, even though private and without worth as literature, is established on principle and authority. The right is property in its essential features. It is, therefore, entitled to all the protection which the

Constitution and laws give to property. From this general statement are to be excepted special instances, such as letters by an agent to or for his principal and others where the conditions indicate that the property in the form or expression is in another than the writer. The absolute right of the author to prevent publication by the receiver may also be subject to limitations arising from the nature of the letter or the circumstances under which it is written or received. Some of these are pointed out in *Folsom v. Marsh*, 2 Story, 100. But these exceptions are narrow and rare, and do not affect materially the general rule.

The extent of this proprietary right, as between the writer and the recipient of letters, requires a closer analysis. It depends upon implications raised by law from the circumstances. This test is a general one, and has been applied to the public delivery of lectures, the presentation of dramas, and other analogous cases. *Abernethy v. Hutchinson*, 3 L. J. Ch. 209; *S. C.* 1 Hall & Tw. 28. *Tompkins v. Halleck*, 133 Mass. 32. *Nicola v. Pitman*, 26 Ch. D. 374, 380. The relative rights of the writer and receiver may vary with different conditions. If there be a request for return or if the correspondence is marked in definite terms, as personal or confidential, such special considerations would need to be regarded. The case at bar presents the ordinary example of friendly correspondence between kinswomen upon topics of mutual private interest. Under such circumstances, What does the writer retain and what does he give to the person to whom the letter is sent? The property right of the author has been described as "an incorporeal right to print [and it should be added to prevent the printing of, if he desires] a set of intellectual ideas or modes of thinking, communicated in a set of words and sentences and modes of expression. It is equally detached from the manuscript, or any other physical existence whatsoever." *Millar v. Taylor*, 4 Burr. 2303, at 2396. It has been called also "the order of words in the . . . composition." *Jefferys v. Boosey*, 4 H. L. Cas. 815, 867. *Holmes v. Hurst*, 174 U. S. 82, 86. *Kalem Co. v. Harper Bros.* 222 U. S. 55, 63. The right of the author to publish or suppress publication of his correspondence is absolute in the absence of special considerations, and is independent of any desire or intent at the time of writing. It is an interest in the intangible and impalpable

thought and the particular verbal garments in which it has been clothed. Although independent of the manuscript, this right involves a right to copy or secure copies. Otherwise, the author's right of publication might be lost. The author parts with the physical and material elements which are conveyed by and in the envelope. These are given to the receiver. The paper upon which the letter is written belongs to the receiver. *Oliver v. Oliver*, 11 C. B. (N. S.) 139. *Grigsby v. Breckinridge*, 2 Bush, 480, 486. *Pope v. Curl*, 2 Atk. 341. *Werckmeister v. American Lithographic Co.* 142 Fed. Rep. 827, 830. A duty of preservation would impose an unreasonable burden in most instances. It is obvious that no such obligation rests upon the receiver, and he may destroy or keep at pleasure. Commonly there must be inferred a right of reading or showing to a more or less limited circle of friends and relatives. But in other instances the very nature of the correspondence may be such as to set the seal of secrecy upon its contents. See *Kenrick v. Danube Collieries & Minerals Co.* 39 W. R. 473. Letters of extreme affection and other fiduciary communications may come within this class. There may be also a confidential relation existing between the parties, out of which would arise an implied prohibition against any use of the letters, and a breach of such trust might be restrained in equity. On the other hand, the conventional autograph letters by famous persons signify on their face a license to transfer. Equitable rights may exist in the author against one who by fraud, theft or other illegality obtains possession of letters. The precise inquiry is whether indifferent letters written by one at the time perhaps little known or quite unknown, which subsequently acquire value as holographic manuscripts, may be marketed as such. This case does not involve personal feelings or what has been termed the right to privacy. 4 Harvard Law Review, 193. The author has deceased. Moreover, there appears to be nothing about these letters, knowledge of which by strangers would violate even delicate feelings. Although the particular form of the expression of the thought remains the property of the writer, the substance and material on which this thought has been expressed have passed to the recipient of the letter. The paper has received the impression of the pen, and the two in combination

have been given away. The thing which has value as an autograph is not the intactable thought, but the material substance upon which a particular human hand has been placed, and has traced the intelligible symbols. Perhaps the autographic value of letters may fluctuate in accordance with their length or the nature of their subject matter. But whatever such value may be, in its essence it does not attach to the intellectual but material part of the letter.

This exact question has never been presented for adjudication, so far as we are aware. There are some expressions in opinions, which dissociated from their connection may be laid hold of to support the plaintiff's contention. See *Dock v. Dock*, 180 Penn. St. 14, 22; *Eyre v. Higbee*, 22 How. Pr. 198; *Palin v. Gathercole*, 1 Collyer, 565. It may well be that title such as appears to exist in the recipient may not go to the extent of being assets in the hands of a decedent, a bankrupt or an insolvent. *Eyre v. Higbee*, 22 How. Pr. 198. *Sibley v. Nason*, 196 Mass. 125. But on principle it seems to flow from the nature of the right transferred by the author to the receiver and of that retained by the writer in ordinary correspondence, that the extent of the latter's proprietary power is to make or to restrain a publication, but not to prevent a transfer. The rule applicable to the facts of this case, as we conceive it to be, is that in the absence of some special limitation imposed either by the subject matter of the letter or the circumstances under which it is sent, the right in the receiver of an ordinary letter is one of unqualified title in the material on which it is written. He can deal with it as absolute owner subject only to the proprietary right retained by the author for himself and his representatives to the publication or non-publication of idea in its particular verbal expression. In this opinion publication has been used in the sense of making public through printing or multiplication of copies.

The result is that an injunction may issue against publication or multiplication in any way, in whole or in part, for advertising or other purposes, of any of the letters described in the bill, and allowing the plaintiff, if he desires, to make copies thereof within a reasonable time, but going no further.

So ordered.

SUPPLEMENT.

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OPINION OF THE JUSTICES TO THE GOVERNOR.

"The power of pardoning offences," which by Const. Mass. c. 2, § 1, art. 8, with the exception there stated, is given to the Governor by and with the advice of the Council, includes not only absolute release from the penalty imposed but also commutation of sentence and respite of sentence.

Under Const. Mass. c. 2, § 1, art. 8, the power to grant an absolute pardon or to commute a sentence can be exercised only by the concurrent action of the Governor and the Council.

The provision of R. L. c. 220, § 39, that a sentence of death shall be executed "within the week appointed by the court, unless the Governor pardons the crime, commutes the punishment therefor or respites the execution," although it makes no express reference to the Council, must be interpreted as referring to the power of pardon, commutation and respite as given by the Constitution, from which alone it can be derived. Otherwise the provision would be unconstitutional.

ON January 11, 1912, a letter from the Governor, containing the following questions, was transmitted to the Justices of the Supreme Judicial Court. On January 12, 1912, the Justices returned the answer which is subjoined.

The letter was as follows:

In relation to the death sentence imposed in the Phelps case, I feel it incumbent upon me to ask the Supreme Court of Massachusetts for a decision as to the responsibility of the Governor in cases involving the capital sentence.

Article eight, Section one, Chapter two, of the Constitution of Massachusetts, says that "the power of pardoning offences . . . shall be in the governor, by and with the advice of council."

From the existing statutes, I am unable to determine whether the commutation of a sentence is of the nature of a conditional pardon. I am also unable to determine whether in the event of either a pardon or a commutation of sentence, the Governor is

expected to obtain the consent as well as the advice of the Council.

In our Massachusetts reports No. 190, the court states in relation to the commutation of a sentence, as follows, —

“They all recognize the fact that the act, first of all, and afterwards for all time, is to be the act of the Governor. The only connection that the Council can have with it is advisory. Whether the Governor takes advice or not, his conclusion must rest finally upon his own judgment. Inasmuch as the responsibility for his determination, with or without advice, must rest upon him, both in the beginning and forever after, the natural course of proceeding would seem to be that he should seek such aid as he might desire from any proper source, and not be obliged to ask advice, in the first instance, from an official body whose opinion could never relieve him from the duty of deciding.”

In view of these uncertainties, it appears to be my duty to ask the Supreme Court also whether the Governor himself has the right to commute a sentence, as from death to life imprisonment.

While the pending sentence of death in the Phelps case brings this matter to my earnest attention, my wish is, irrespective of any action which might result in this instance, to find out exactly what obligation rests upon the Governor under our Constitution and statutes in such instances.

To his Excellency

Eugene N. Foss,

Governor of the Commonwealth of Massachusetts:

The Justices of the Supreme Judicial Court, in reply to the questions presented to them, respectfully submit the following answers:

The power, duty and responsibility of the Governor respecting pardons is found in the Constitution of the Commonwealth. Article VIII, Section I, Chapter II of Part the Second provides that “The power of pardoning offences, except such as persons may be convicted of before the senate by an impeachment of the house, shall be in the governor, by and with the advice of council.” The words “The power of pardoning offences” are

comprehensive. They include not only that absolute release from the penalty which is referred to commonly as a pardon, but those lesser exercises of clemency which are described as conditional pardon, commutation of sentence and respite of sentence. The only authority for the executive department of the government to mitigate or release from sentence for crime is this language of the Constitution. The Governor is clothed with authority to act in that respect only "by and with the advice of council." The unmistakable meaning of these words is that he can act only in conformity to the advice of the Council. He may decline to take action although the Council advise him to do so. Responsibility for granting a pardon rests upon the Governor and he cannot be compelled to take such action by the Council. The language quoted in your letter from the *Opinion of the Justices*, 190 Mass. 616, 619, 620, has reference to this aspect of the duty of the Governor. Equal responsibility rests upon the Council. The granting of a full or a partial pardon is the result of concurrent action by both the Governor and the Council. Neither alone can take effective action. Both must agree before the Constitution is satisfied.

The Governor is not required to ask the advice of the Council in forming his opinion. He may refuse to pardon without first referring the matter to the Council. But if he desires to grant a pardon, he must take the advice of the Council before undertaking to act. This is pointed out clearly in the *Opinion of the Justices*, 190 Mass. 616, 619, in these words: "The provision for advice of the Council is a requirement that their approval and concurrence shall accompany the affirmative act and enter into it before it becomes complete and effective." The power to pardon as vested in the Governor is not absolute but conditional, and that condition is that it shall be exercised in accordance with the advice of the Council. Such is the plain reading of the Constitution; and so far as we know this always has been the practice.

The same principle applies whether the act be a complete or a modified pardon. A commutation of sentence, which is the substitution of a lighter for a more severe punishment, is an exercise of the pardoning power and must be in accordance with the Constitution. It is an act of the Governor which becomes

effective only when concurred in by the Council. See *Opinion of the Justices*, 14 Mass. 472.

Although no express reference is made to the Council in R. L. c. 220, § 39, which relates to the commutation of sentences, the statute must be read as subject to the provisions of the Constitution. Otherwise the statute would be unconstitutional. It cannot be assumed that the Legislature intended to confer upon the Governor a power which would be beyond its constitutional authority. The power of commutation of sentence, conditional pardon and respite of sentence referred to in this and other sections of the statute is not created by the statute but is derived wholly from the Constitution. The only right of the Legislature is to enact laws to render the exercise of the constitutional power efficient and convenient. *Kennedy's case*, 135 Mass. 48.

Mr. Justice Loring, being ill, has not considered these questions.

January 12, 1912.

ARTHUR P. RUGG.
JAMES M. MORTON.
JOHN W. HAMMOND.
HENRY K. BRALEY.
HENRY N. SHELDON.
CHARLES A. DECOURCY.

INDEX.

ABATEMENT.

See that subtitle under PRACTICE, CIVIL.

ABSENTEE.

A decree of the Probate Court under R. L. c. 144, appointing a receiver of the property of a person adjudged an absentee, was held not to show necessarily that such a person was a non-resident of the Commonwealth within the provisions of R. L. c. 170, § 5. *Johnson v. Carr*, 1.

Whether a judgment in an action against a non-resident should be general or special and only against property attached in the action, see *Ibid*.

A failure of the plaintiff in an action at law to give to a non-resident defendant the notice required by R. L. c. 170, § 5, should be pleaded in abatement and not in bar. *Ibid*.

Plea in abatement for failure of the plaintiff to give to a non-resident defendant the notice required by R. L. c. 170, § 5, after denial of a motion to dismiss the action on the same ground, see *Ibid*.

ACCOUNT STATED.

Action upon a conditional order in writing accepted by the defendant, where it was held to be a question for the jury, whether a certain payment was the result of a final accounting which would fulfil the condition of the order. *Millen v. Williams*, 516.

ADMINISTRATOR.

See EXECUTOR AND ADMINISTRATOR.

ADULTERATED FOOD.

See FOOD.

ADVERSE USE.

See PRESCRIPTION.

AGENCY.

Existence of Relation.

Contract between an English manufacturer and a Boston merchant as to the sale of the manufacturer's goods by the merchant, which was held to have a double aspect, in one aspect contemplating the relation of principal and agent, and in another that of vendor and vendee. *John Hetherington & Sons, Ltd., v. William Firth Co.* 8.

Action against a corporation, engaged in the business of furnishing messengers to carry parcels, to recover for the loss of a parcel because of the negligence of one to whom it was transferred for delivery, in which it was held, that under the circumstances the employee of the defendant who lost the parcel was not an agent of the plaintiff, and that the case was distinguishable from *Haskell v. Boston District Messenger Co.* 190 Mass. 189. *Murray v. Postal Telegraph-Cable Co.* 188.

Scope of Authority or Employment.

It was held not to be within the scope of the authority of an agent, who had authority to deliver and to receive documents relating to the installation of a soda water fountain, to bind his employer by admissions as to the fountain's imperfections. *Puffer Manuf. Co. v. Krum*, 211.

Where the owner of a parcel of land puts it into the hands of a real estate broker for sale with no instructions as to the price or terms of sale, such owner is not bound by an agreement in writing, signed by the broker as his agent, to sell the land for a certain price on certain terms, unless he ratifies the contract thus made in his behalf. *Cohen v. Jackson*, 328.

Facts which were held not to show such ratification. *Ibid.*

Where the owner of an automobile ships by an express company certain parts of the automobile to a machine shop to be repaired, without giving the proprietor of the machine shop any special instructions as to the contract for the return shipment, this authorizes the proprietor of the machine shop in returning the parts to make the usual shipping agreement and, if such agreement contains a provision limiting to \$50 the value of the property transported and the amount to be recovered in case of its injury, this limitation is binding on the owner. *Peirce v. American Express Co.* 383.

In an action of tort evidence of a statement by one who might have been found to be a superintendent for the defendant was held to be inadmissible because it did not appear to have been made within the scope of the superintendent's employment. *Murphy v. Fred T. Ley & Co., Inc.*, 871.

Employer's Liability.

See that subtitle under NEGLIGENCE.

Unlawful Interference by Third Person.

One, who serves on the employer of a workman notice of a supposed assignment of wages by the workman, which in fact was made by a different

person of the same name, and on being informed by the workman of the mistake unjustifiably refuses to withdraw the notice and thereby causes the workman's discharge, is liable to the workman in an action of tort for the damages resulting from such unlawful interference with his employment. *Lopes v. Connolly*, 487.

ANIMAL.

In an action by a hostler against his employer, the proprietor of a large livery stable, for personal injuries due to the running away of a horse, it was held that certain evidence regarding particular instances of viciousness justified findings that the horse had a habit of running away and that the defendant knew of this vicious habit. *Scanlon v. Cavanaugh*, 291.

APPEAL.

See that subtitle under EQUITY PLEADING AND PRACTICE; LAND COURT; PRACTICE, CIVIL.

ARREST.

Passenger, who was arrested unlawfully upon a railroad train and was taken from the train through the streets of a town by employees of the railroad corporation because he had refused to comply with a reasonable rule or regulation of the corporation operating the railroad, was allowed to recover from the railroad as for a trespass *ab initio*. *Hull v. Boston & Maine Railroad*, 159.

ASSAULT AND BATTERY.

In an action against a street railway company for the conscious suffering and death of the plaintiff's intestate alleged to have been caused by an assault committed upon him by a conductor after he had refused to comply with a regulation of the defendant prohibiting passengers from riding in a vestibule of a car, evidence tending to show a custom of the defendant to permit passengers to ride in vestibules was excluded rightly. *Liversidge v. Berkshire Street Railway*, 284.

Proper disposition by the trial judge of requests for rulings as to the rights of the passenger in such a case. *Ibid*.

Passenger, who was arrested unlawfully upon a railroad train and was taken from the train through the streets of a town by employees of the railroad corporation because he had refused to comply with a reasonable rule or regulation of the corporation operating the railroad, was allowed to recover from the corporation as for a trespass *ab initio*. *Hull v. Boston & Maine Railroad*, 159.

ASSESSMENT.

See that subtitle under TAX.

ASSIGNMENT.

Of an Insurance Policy.

A request in writing, made of an insurance company by a policy holder and assented to in writing by the company, which was held to be a valid transfer of part of the proceeds of the policy to the wife of the insured and of part to his son, although neither the wife nor the son knew of it, and, if made in fraud of the insured's creditors, under St. 1907, c. 576, § 73, to be valid as to the part given to the wife and invalid as to the part given to the son. *York v. Flaherty*, 35.

Of Wages.

One, who serves on the employer of a workman notice of a supposed assignment of wages by the workman, which in fact was made by a different person of the same name, and, on being informed by the workman of the mistake, unjustifiably refuses to withdraw the notice and thereby causes the workman's discharge, is liable to the workman in an action of tort for the damages resulting from this unlawful interference with his employment. *Lopes v. Connolly*, 487.

ATTACHMENT.

Of real estate of absent or non-resident defendant, see *Johnson v. Carr*, 1.
A deputy sheriff who is in possession of property under attachment upon writs in different actions against the same defendant is the officer who must receive and levy all executions which may issue in any of the actions, and he may refuse to deliver the property to another officer who demands it by virtue of an execution in one of the actions. *Beaulieu v. Clark*, 90.

ATTEMPT TO COMMIT LARCENY.

See LARCENY.

ATTORNEY AT LAW.

Compensation and Fees.

Attorneys charged by the Superior Court with the prosecution of disbarment proceedings may be awarded compensation by the court under R. L. c. 165, § 44. *Burrage v. County of Bristol*, 299.

The word "costs" as applied to proceedings in court ordinarily means only legal or taxable costs and does not include counsel fees. *Ibid*.

Liability for Wrongful Acts.

Action at law cannot be maintained by the next of kin of an intestate against an attorney employed by the administrator, to recover damages for alleged

wrongful acts of the defendant while acting as such attorney. *Norton v. Lilley*, 214.

Disbarment.

Compensation of attorneys charged by the Superior Court with the prosecution of disbarment proceedings, see *Burrage v. County of Bristol*, 299.

AUTOMOBILE.

Action by the operator of an automobile for personal injuries caused by its being run into by a street car. *Keeney v. Springfield Street Railway*, 44.

BAILMENT.

If a corporation engaged in the business of furnishing upon application messengers for the delivery of parcels receives as bailee a parcel from a customer and not under such circumstances that any of its servants or agents becomes a servant or agent of the customer, and if the parcel is misdelivered by its employee, this constitutes a conversion for which the corporation is liable. *Murray v. Postal Telegraph-Cable Co.* 188.

Action against a corporation, engaged in the business of furnishing messengers to carry parcels, to recover for the loss of a parcel because of the negligence of one to whom it was transferred for delivery, in which it was held that under the circumstances the employee of the defendant who lost the parcel was not an agent of the plaintiff, and that the case was distinguishable from *Haskell v. Boston District Messenger Co.* 190 Mass. 189. *Ibid.*

Instructions in such action to the effect that it was common knowledge that such a corporation did not undertake to deliver parcels of great value, and that if the plaintiff delivered such a parcel to the defendant's servant without disclosing its value he was not in the exercise of due care and could not recover, were held to be erroneous. *Ibid.*

BANKRUPTCY.

Unlawful Preference.

Where an insolvent person purchases goods from one who knows of his insolvency and gives therefor checks dated ten days ahead, which afterwards are paid, such payments may be found to have been made in satisfaction of antecedent debts and to have been preferences within § 60, a, b, of the bankruptcy act of 1898 as amended in 1903. *Brown v. Pelonsky*, 502.

Evidence at the trial of an action by a trustee in bankruptcy against a creditor of the bankrupt to recover, under the provisions of § 60, a, b, of the bankruptcy act of 1898 as amended in 1903, payments alleged to have been made as unlawful preferences by the bankrupt to the defendant, which was held to warrant the jury in finding for the plaintiff. *Ibid.*

Discharge.

Debt of a bankrupt, created by his misappropriation of money while acting in a fiduciary capacity, does not lose its fiduciary character if, after the bankrupt has deposited the money in a bank in his individual name, given the beneficial owner a check on the deposit and stopped payment of the check, the beneficial owner reduces his claim to judgment in an action on the check; and a suit on such a judgment is not barred by the bankrupt's subsequent discharge in bankruptcy, although the judgment debt was proved as a claim in the bankruptcy proceedings. *Brown v. Hannagan*, 246.

BARTER.

Action on an account annexed for the value of property delivered to the defendant under a contract of barter or exchange which the defendant abandoned after part performance, cannot be maintained if the plaintiff has received and retained a part of the property which was to be delivered to him by the defendant under the contract. In order to rescind the contract and sue on a *quantum valebat*, the plaintiff first must put the defendant in the condition in which he was before the bargain. *Owen v. Button*, 219.

BETTERMENT.

See that subtitle under TAX.

BILLS AND NOTES.

Validity.

Fact, that there could not be both a recovery by the plaintiff in an action of deceit and upon a plea in recoupment of damages in a cross action upon a promissory note, was held to render immaterial an exception by the defendant in the cross action to the admission of certain evidence on the question of fraud. *Townsend v. Niles*, 524.

Order.

Action upon a conditional order in writing accepted by the defendant where it was held to be a question for the jury whether a certain payment was the result of a final accounting which would fulfil the conditions of the order. *Millen v. Williams*, 516.

Guarantor.

Application of the rule, that in the absence of any proof to the contrary the parties to a promissory note are liable on it according to the legal effect of the instrument, in a case where the guarantor of a note contended that she was liable for only half the amount of the note because of an agreement between her and the payee which there was no evidence to prove. *Enterprise Brewing Co. v. Canning*, 285.

Effect as Payment.

The presumption of fact, which exists in this Commonwealth, that a negotiable promissory note given for an unsecured simple contract debt was given and taken in payment of that debt, is not to be extended as of course to the case of a debt secured by a lien. *Cary Brick Co. v. Wheeler*, 338.

Application of the foregoing proposition of law, in a petition for the enforcement of a mechanic's lien where the respondent, claiming credit on account of a promissory note given by him to the petitioner but never paid, was held to have the burden of proving that the note was given and taken as payment. *Ibid.*

BOARD OF HEALTH.

Municipal.

Under R. L. c. 102, § 71, a suit in equity may be maintained in the Superior Court by a city whose population exceeds twenty-five thousand to restrain the erection, occupation or use of a building for a stable without a license from the board of health, where there is a reasonable certainty that the building in question is to be occupied and used as a stable unlawfully, although no actual injury to the public has been inflicted at the time the bill is filed. *Worcester Board of Health v. Tupper*, 378.

In such a suit, where it appears that the defendant has erected a building which he intends to occupy and use as a stable for horses, it is no defense to show that the board of health acted arbitrarily and unjustly in refusing the defendant a license, nor is it material for the defendant to show the excellent sanitary condition of the building or its complete plumbing and appointments and its mode of construction, nor to show that stables of other persons in more densely populated sections of the city had been licensed. *Ibid.*

Such a suit must be brought by the city itself and not by the members of its board of health. *Ibid.*

BOND.

Action on an oral agreement to indemnify the plaintiff for any loss he might sustain if he should become one of two sureties on a bail bond. *Cleveland v. Peirce*, 496.

Where the owner of a certain building insured it after he had given a bond for a deed thereof, and the obligee of the bond assigned it to one, who paid to the owner the balance due upon the bond but took no conveyance of the property, and the property then was destroyed by fire, the owner was held to have had an insurable interest in the property at the time of the fire to the extent of its full value. *Adams v. North American Ins. Co.* 550.

Action by the owner of certain land against a contractor and a surety upon a bond guaranteeing the performance by the contractor of a con-

Bond (*continued*).

tract for the erection of a building upon the land, in which the contract was construed and it was held that certain payments of money and the giving of a certain note by the owner to the contractor were not in violation of the contract and did not release the surety from liability. *Borucinski v. Hampden Real Estate Trust*, 99.

BREAKING AND ENTERING.

Circumstantial evidence which was held to be sufficient to sustain the burden of proof resting on the Commonwealth at the trial of an indictment for breaking and entering and larceny. *Commonwealth v. Taylor*, 443.

BRIDGE.

Municipality was held bound under St. 1906, c. 463, Part I, § 38, to keep in repair the under floor of a bridge over tracks of a railroad, because it was part of the "framework" and not of the "surface" of the bridge. *Selectmen of Natick v. Boston & Albany Railroad*, 229.

BROKER.

Where the owner of a parcel of land puts it into the hands of a real estate broker for sale with no instructions as to the price or terms of sale, such owner is not bound by an agreement in writing, signed by the broker as his agent, to sell the land for a certain price on certain terms, unless he ratifies the contract thus made in his behalf. *Cohen v. Jackson*, 328.

Facts which were held not to show such ratification. *Ibid*.

STOCKBROKER, see that title.

CAPITAL AND INCOME.

See TRUST, *Accounts of Trustees*.

CARRIER.

Of Passengers.

One who is within a station used by a corporation operating both a surface and an elevated railway and is passing from one car to another is a passenger of the corporation. *Kelley v. Boston Elevated Railway*, 454.

Discussion by Rugg, C. J., of the effect upon the contract of carriage of reasonable regulations posted by a common carrier of passengers and of violations thereof by passengers. *Renaud v. New York, New Haven, & Hartford Railroad*, 553.

Under ordinary circumstances and where no other facts appear, a passenger who merely fails to observe a reasonable regulation of a common carrier of passengers does not thereby cease to be a passenger. *Ibid*.

Where violation of a reasonable rule of a common carrier of passengers by a passenger does not involve malicious conduct, moral turpitude, gross and

wilful disregard of the rights of others, or a plain surrender of the duty of a passenger, it does not of itself alone terminate the contract of carriage and transform the one who was a passenger into a trespasser or a bare licensee. *Renaud v. New York, New Haven, & Hartford Railroad*, 558.

Unlawful arrest of a passenger upon a railroad train for refusal to obey a reasonable regulation. *Hull v. Boston & Maine Railroad*, 159.

In an action against a street railway company for the conscious suffering and death of the plaintiff's intestate alleged to have been caused by an assault committed upon him by a conductor after he had refused to comply with a regulation of the defendant prohibiting passengers from riding in a vestibule of a car, evidence tending to show a custom of the defendant to permit passengers to ride in vestibules was excluded rightly. *Liversidge v. Berkshire Street Railway*, 284.

Proper disposition by the trial judge of requests for rulings as to the rights of the passenger in such a case. *Ibid.*

Other actions by passengers against street railway and railroad corporations for personal injuries, see NEGLIGENCE, *Street Railway: Passengers*; NEGLIGENCE, *Railroad: Passengers*.

Of Goods.

Contract, limiting liability of a carrier for a loss of goods, which was made by the proprietor of a machine shop in returning to the owner parts of an automobile sent to him for repair, was held to be binding upon the owner. *Pierce v. American Express Co.* 888.

A stipulation in a bill of lading of goods transported by rail, that the carrier shall not be liable for any loss or damage "by fire for any cause whatsoever occurring" during the transit, does not relieve the carrier from liability for loss of or damage to the goods by a fire caused by the negligence of the servants of the carrier. *P. Garvan, Inc., v. New York Central & Hudson River Railroad*, 276.

Where goods are transported by a railroad corporation to one of its stations, at which the rule for the delivery of goods requires that the consignee shall be notified of their arrival, and the car containing the goods is left standing on a side track in the corporation's freight yard, where, before any notice has been given to the consignee of the arrival of the goods, they are injured by fire while still in the car, the corporation has not become a mere warehouseman and its liability for the injury is that of carrier of the goods. *Ibid.*

Fact, that goods in a sealed car were injured by fire while in a railroad freight yard, was held to be evidence warranting a submission to a jury of the question, whether the only reasonable origin of the fire involved negligence of employees of the railroad corporation. *Ibid.*

Report of the detective department of the district police was held inadmissible in an action against a railroad corporation by one whose goods had been injured by fire while they were in the possession of the defendant as a carrier. *Ibid.*

Proper refusal, by a judge presiding at the trial of such an action to compel the plaintiff to elect between a count for negligence and a count in contract

Carrier (*continued*).

for money received by the defendant from the sale of the damaged goods after the plaintiff had refused them. *P. Garvan, Inc., v. New York & Central Hudson River Railroad*, 275.

Where goods are sold by sample at the buyer's place of business and the seller ships the goods by railroad consigned to the buyer, who has given no directions for transportation, the seller paying the freight charges, the title in the goods remains in the seller until they have been delivered by the carrier to the buyer and have been accepted by him, and, if the goods are injured by fire while in the hands of the carrier, the right of action for such injury is in the seller. *Ibid*.

CHARITY.

What constitutes.

A corporation called the Young Men's Christian Association of Newburyport was held to be a benevolent or charitable institution within the meaning of those words in St. 1909, c. 490, Part I, § 5, cl. 3, exempting the property of such an institution from taxation, the fact that some of its benefits were afforded only to its members, and a limitation of the privileges of becoming "active" members, of voting and of holding office not being material. *Little v. Newburyport*, 414.

Exemption from Taxation.

A fund, bequeathed to trustees for the purpose of paying the net income thereof "for the general purposes" of a Young Men's Christian Association which is a benevolent or charitable institution, is exempt from taxation under the provisions of St. 1909, c. 490, Part I, § 5, cl. 3. *Little v. Newburyport*, 414.

CITIES AND TOWNS.

See MUNICIPAL CORPORATIONS.

CODICIL.

A plain gift in a will will not be modified by uncertain language of a codicil to any greater extent than such language expressly requires. *Lovering v. Balch*, 105.

COMMUTATION OF SENTENCE.

As to pardon or commutation of sentence by concurrent action of the Governor and Council, see *Opinion of the Justices*, 609.

COMPROMISE.

Action upon a conditional order in writing accepted by the defendant where, upon evidence of settlements of actions at law and a mechanic's lien petition, and of a certain payment, it was held to be a question for the jury whether the payment was the result of a final accounting which would fulfil the conditions of the order. *Mullen v. Williams*, 516.

CONSTITUTIONAL LAW.

Pardon or Commutation of Sentence.

"The power of pardoning offences," which by Const. Mass. c. 2, § 1, art. 8, with the exception there stated, is given to the Governor by and with the advice of the Council, includes not only absolute release from the penalty imposed but also commutation of sentence and respite of sentence. *Opinion of the Justices*, 609.

Under Const. Mass. c. 2, § 1, art. 8, the power to grant an absolute pardon or to commute a sentence can be exercised only by the concurrent action of the Governor and the Council. *Ibid.*

The provision of R. L. c. 220, § 39, that a sentence of death shall be executed "within the week appointed by the court, unless the Governor pardons the crime, commutes the punishment therefor or respites the execution," although it makes no express reference to the Council, must be interpreted as referring to the power of pardon, commutation and respite as given by the Constitution, from which alone it can be derived. Otherwise the provision would be unconstitutional. *Ibid.*

Police Power.

Constitutionality of St. 1909, c. 514, § 48, limiting the time during which women and children may be employed in manufacturing and mechanical establishments. *Commonwealth v. Riley*, 387.

The means provided for enforcing such statute by the posting of certain notices, stating the hours of labor of women and children and of intermissions for meals, and the infliction of a penalty for a failure to do so, when read with the other provisions of the statute, are not unreasonable, unnecessary or arbitrary and are within the powers of the Legislature. *Ibid.*

Ex post Facto Law.

St. 1910, c. 555, § 3, repealing R. L. c. 157, § 8, which provided that capital cases should be tried before two or more judges of the Superior Court, is not an *ex post facto* law as applied to the trial before a single judge of the Superior Court of an indictment for a murder committed before the repeal of R. L. c. 157, § 8. *Commonwealth v. Phelps*, 78.

CONTRACT.

What constitutes.

Evidence in an action of contract which was held sufficient to warrant the submission to a jury of the questions, whether the defendant orally had agreed to indemnify the plaintiff for any loss he might sustain if he should become one of two sureties upon a bail bond, and whether such oral agreement was several or was joint. *Cleveland v. Peirce*, 496.

Evidence, in an action by a gas company for rent of a gas meter, which was held to warrant a finding that gas had been received by the defendant from the plaintiff in accordance with a written notice from the plaintiff that a

Contract (*continued*).

meter charge would be made. *Amesbury & Salisbury Gas Co. v. Gibney*, 498.

Consideration.

Promise to record a deed, even if the deed were invalid, was held under the circumstances to have been a valid consideration for an agreement to furnish firewood to the promisor for life. *Hall v. Sears*, 185.

The withdrawal of an appeal from a decree of the Probate Court allowing a will is a good consideration for a promise to pay money to the person withdrawing the appeal, if the contest was a genuine one and made in good faith, whether in fact it was well grounded or not. In the present case there was held to have been evidence of good faith. *Silver v. Graves*, 28.

Validity.

In an action on an oral contract, the defense that the contract was made on Sunday must be pleaded in order to be available or in order that a conversation relating to the contract should be objected to because it took place on Sunday. *Silver v. Graves*, 26.

In an action upon an oral contract it is proper to admit in evidence to prove the making of the contract a conversation which occurred on Sunday, if it was merely preliminary to the contract which was concluded on a secular day. *Ibid.*

A promise, made on the consideration of the withdrawal by the person to whom it was made of an appeal from the allowance of a will by the Probate Court, to pay the appellant "a sum of money that would be satisfactory," was held to be a promise to pay what ought to satisfy a reasonable person, or what would be fair and just under the circumstances, and to constitute a binding contract not void for uncertainty or indefiniteness. *Ibid.*

Statute of frauds was held not to be a defense to an action for a breach of a contract in writing as modified by a proposition in writing by the defendant which the plaintiff had assented to orally. *John Hetherington & Sons, Ltd., v. William Firth Co.* 8.

A stipulation in a bill of lading of goods transported by rail, that the carrier shall not be liable for any loss or damage "by fire for any cause whatsoever occurring" during the transit, does not relieve the carrier from liability for loss of or damage to the goods by a fire caused by the negligence of the servants of the carrier. *P. Garvan, Inc., v. New York Central & Hudson River Railroad*, 275.

In an action of tort by an employee of a sleeping car company against a railroad company for personal injuries, where the defendant contended that the plaintiff had made a contract in writing with his employer the effect of which was to release the defendant from liability, certain evidence was held to be sufficient to entitle the plaintiff to go to the jury on the question, whether his signature to the contract was procured by false and fraudulent representations so that the contract was not binding upon him. *Kean v. New York Central & Hudson River Railroad*, 449.

Construction.

Construction of a contract by a manufacturer to supply to a customer all the bottles the customer might require during a certain period, where the customer was to give advance notice of his requirements. *Carrick v. Liquezone Co.* 594.

Settlement of accounts between two partners which was held to be a final settlement into which all claims were merged, so that a suit for an accounting between the partners could not be maintained thereafter. *Coffey v. Coffey*, 480.

Evidence in an action of contract which was held sufficient to warrant the submission to a jury of the question whether an oral agreement to indemnify the plaintiff for any loss he might sustain if he should become one of two sureties upon a bail bond was several or was joint. *Cleveland v. Peirce*, 496.

Action by the owner of certain land against a building contractor and a surety upon a bond guaranteeing the performance by the contractor of a contract for the erection of a building upon the land, in which the contract was construed and it was held that certain payments of money and the giving of a certain note by the owner to the contractor were not in violation of the contract and did not release the surety from liability. *Borucinski v. Hampden Real Estate Trust*, 89.

A promise, made on the consideration of the withdrawal by the person to whom it was made of an appeal from the allowance of a will by the Probate Court, to pay the appellant "a sum of money that would be satisfactory," was held to be a promise to pay what ought to satisfy a reasonable person, or what would be fair and just under the circumstances, and to constitute a binding contract not void for uncertainty or indefiniteness. *Silver v. Graves*, 26.

Contract between an English manufacturer and a Boston merchant as to the sale of the manufacturer's goods by the merchant, which was held to have a double aspect, in one aspect contemplating the relation of principal and agent and in another that of vendor and vendee. *John Hetherington & Sons, Ltd., v. William Firth Co.* 8.

In Writing.

Evidence, tending to vary the terms of an order in writing containing no ambiguity and not procured by fraud, was held to be inadmissible. *Puffer Manuf. Co. v. Krum*, 211.

Action on a contract in writing cannot be maintained where it appears that the plaintiff was unable completely to perform the contract but it was agreed that the plaintiff should complete its performance and that then the parties should make an adjustment as to the amount due to the plaintiff. The plaintiff can recover only on the contract as modified. *Owen v. Button*, 219.

In an action upon an unequivocal agreement in writing to pay for volumes of an existing publication, the agreement containing a statement that it was unconditional, the defendant was held not to be entitled to introduce

Contract (*continued*).

evidence of an agreement by the agent which tended to vary the contract and was not sufficient to support a defense of fraud. *Friedman v. Pierce*, 419.

Implied.

In fact.

The acceptance of valuable services or material benefits does not create an implied promise to pay for them where the services performed or the benefits conferred were intended to be gifts. *Marcy v. Shelburne Falls & Colrain Street Railway*, 197.

Action against a corporation by one who was its president and a member of its board of directors for a reasonable compensation for services alleged to have been rendered to the defendant in a special capacity and not as president or a director. *Ibid*.

Evidence, in an action by a gas company for rent of a gas meter, which was held to warrant a finding that gas had been received by the defendant from the plaintiff in accordance with a written notice from the plaintiff that a meter charge would be made. *Amesbury & Salisbury Gas Co. v. Gibney*, 498.

In law.

Proper refusal, by a judge presiding at the trial of an action against a carrier for damages resulting from injury to goods of the plaintiff while in the defendant's possession, to compel the plaintiff to elect between a count for negligence and a count in contract for money received by the defendant at a sale of the damaged goods after the plaintiff had refused them. *P. Garvan, Inc., v. New York Central & Hudson River Railroad*, 275.

Action on an account annexed, for the value of property delivered to the defendant under a contract of barter or exchange which the defendant abandoned after part performance, cannot be maintained if the plaintiff has received and retained a part of the property which was to be delivered to him by the defendant under the contract. In order to rescind the contract and sue on a *quantum valebat* the plaintiff must first put the defendant in the condition in which he was before the bargain. *Owen v. Button*, 219.

In an action of contract against a stockbroker by a customer where the declaration contained a count for breach of contracts for the purchase and sale on margin of shares of stock by the defendant for the plaintiff and a count for money had and received by the defendant to the plaintiff's use, and it appeared that the plaintiff had paid money to the defendant at various times, it was held that it could not be ruled that if the parties had a different idea of their contractual relations their minds never met and there never was any contract between them, because, if the minds of the parties did not meet and there was no agreement between them, the defendant was not justified at all in using the plaintiff's money and must account to him for it. *Greene v. Corey*, 536.

Building Contract.

Action by the owner of certain land against a building contractor and a surety upon a bond guaranteeing the performance by the contractor of a con-

tract for the erection of a building upon the land, in which the contract was construed and it was held that certain payments of money and the giving of a certain note by the owner to the contractor were not in violation of the contract and did not release the surety from liability. *Borucinski v. Hampden Real Estate Trust*, 99.

Modification.

In an action for breach of a contract in writing as modified by a proposal in writing by the defendant assented to orally by the plaintiff and acted upon by both parties, the statute of frauds was held not to be a defense. *John Hetherington & Sons, Ltd., v. William Firth Co. 8.*

Cancellation.

Mutilation of a contract in writing which was held not to amount to a cancellation of it as matter of law, but to be merely evidence thereof. *John Hetherington & Sons, Ltd., v. William Firth Co. 8.*

Rescission.

Action on an account annexed, for the value of property delivered to the defendant under a contract of barter or exchange which the defendant abandoned after part performance, cannot be maintained if the plaintiff has received and retained a part of the property which was to be delivered to him by the defendant under the contract. In order to rescind the contract and sue on a *quantum valebat* the plaintiff first must put the defendant in the condition in which he was before the bargain. *Owen v. Button*, 219.

Performance and Breach.

Action by the owner of certain land against a building contractor and a surety upon a bond guaranteeing the performance by the contractor of a contract for the erection of a building upon the land, in which the contract was construed and it was held that certain payments of money and the giving of a certain note by the owner to the contractor were not in violation of the contract and did not release the surety from liability. *Borucinski v. Hampden Real Estate Trust*, 99.

In an action upon a written agreement by the defendant to receive and pay for certain volumes, a year's subscription to a certain periodical to be given to the defendant free, a verdict should not have been ordered for the plaintiff for the full contract price, because there was evidence that the periodical was sent to him only for two weeks. *Friedman v. Pierce*, 419.

In an action of contract against a stockbroker by a customer, for a failure of the defendant to fulfil orders to buy and sell stock for the plaintiff upon margin, after the plaintiff had proved payments to and acceptance by the defendant of sums of money for the purpose alleged, the burden was on the defendant to show that the money had been used in the manner authorized in the agreement with the plaintiff. *Greene v. Corey*, 586.

In an action against a stockbroker by a customer for margins paid under an

Contract (*continued*).

agreement by the stockbroker to purchase shares of stock in accordance with the customer's orders, the stockbroker, to prove that he carried out the agreement through a correspondent upon an exchange where the shares were dealt in, must prove that the correspondent had under his control, free from the just demands of other customers and available for delivery to the plaintiff, the shares of stock of which upon payment the plaintiff was entitled to demand delivery. *Greene v. Corey*, 536.

And in such an action it is not a sufficient defense for the defendant to prove merely that in good faith he transmitted the plaintiff's orders to reputable correspondents upon the stock exchange of a city where they could be carried out and paid the demanded price for their due execution and obtained a valid contractual obligation with such correspondents. *Ibid*.

Action for a breach of a contract by which the plaintiff agreed to supply to the defendant his entire supply of bottles for a certain period, and the defendant was to give advance notice of his requirements. *Carrick v. Liquorzone Co.* 594.

Action on a contract in writing cannot be maintained where it appears that the plaintiff was unable completely to perform the contract but it was agreed that the plaintiff should complete its performance and that then the parties should make an adjustment as to the amount due to the plaintiff. The plaintiff can recover only on the contract as modified. *Owen v. Button*, 219.

In an action upon a promissory note given as part payment for a soda water fountain to be installed by the plaintiff, the defendant, who has not filed an answer in recoupment, cannot claim an allowance for damages caused by carelessness of the plaintiff in the installation of the fountain. *Puffer Manuf. Co. v. Krum*, 211.

Suit in equity for the specific performance of a covenant by a railroad corporation to build a canal, which was dismissed because the plaintiff had failed for an unreasonably long time to do acts which were conditions precedent to performance by the defendant and had unreasonably delayed the beginning and the prosecution of the suit. *Whitney v. Cheshire Railroad*, 263.

CONVERSION.

If a corporation engaged in the business of furnishing upon application messengers for the delivery of parcels receives a parcel from a customer as a bailee and not under such circumstances that any of its servants or agents becomes a servant or agent of the customer, and if the parcel is misdelivered by its employee, this constitutes a conversion for which the corporation is liable. *Murray v. Postal Telegraph-Cable Co.* 188.

Instructions to the jury at the trial of such an action to the effect that it was common knowledge that such a corporation did not undertake to deliver parcels of great value, and that, if the plaintiff delivered such a parcel to the defendant's servant without disclosing its value, he was not in the exercise of due care and could not recover, were held to be erroneous. *Ibid*.

CORPORATION.

Proof of Identity.

Facts in evidence in an action against a corporation for personal injuries, which were held to warrant an inference that the defendant and the corporation which was responsible for the plaintiff's injuries were identical. *Murphy v. Fred T. Ley & Co., Inc.*, 371.

Officers and Agents.

It is a matter of common knowledge of which a court may take judicial notice that valuable services frequently are rendered to business, banking, insurance and public service, as well as to charitable corporations, by their officers under circumstances which are inconsistent with any presumption that compensation is to be paid. *Marcy v. Shelburne Falls & Colrain Street Railway*, 197.

Evidence was held properly to have been admitted, at the trial of an action against a corporation by its president to recover the value of special services rendered, to show the state of mind of the members of the board of directors of the corporation as to whether they understood that the services were to be paid for or were rendered in the plaintiff's capacity as an officer of the defendant. *Ibid.*

Conduct of the directors of a corporation toward a stockholder which was held to be so lacking in the good faith which the fiduciary nature of their powers required as to entitle the stockholder to maintain a suit in equity to enjoin their action. *Adams v. Protective Union Co.* 172.

By-laws.

Validity of a certain by-law of a corporation, restricting the sale and transfer of shares of the capital stock, was considered but not decided. *Adams v. Protective Union Co.* 172.

Transfer of Shares.

Suit in equity against a corporation by the administrator of the estate of one among whose effects a certificate of shares of the capital stock of a predecessor of the defendant was found, where it was held that a finding of a master, to the effect that the shares represented by the certificate had been sold by the plaintiff's intestate to one acting in behalf of the defendant, was not open to revision on appeal. *Hughes v. Northampton Street Railway*, 206.

Municipal Corporations.

See that title.

CUSTOM.

In an action against a street railway company for the conscious suffering and death of the plaintiff's intestate alleged to have been caused by an assault committed upon him by a conductor after he had refused to comply with a

Custom (*continued*).

regulation of the defendant prohibiting passengers from riding in a vestibule of a car, evidence tending to show a custom of the defendant to permit passengers to ride in vestibules was excluded rightly. *Liversidge v. Berkshire Street Railway*, 284.

At the trial of an action by an employee of a sleeping car company against a railroad company to recover for injuries caused by his being thrown from the top of a car by the jar caused by an engine being bumped against it, evidence of a custom of conductors of the defendant to give warnings to men working on the tops of cars of the fact that an engine was about to be attached is admissible. *Kean v. New York Central & Hudson River Railroad*, 449.

See also USAGE.

DAMAGES.

For Property taken or damaged under Statutory Authority.

On a petition to recover compensation for land taken under a statute for a public reservation, the petitioner is not entitled to recover any increase in the value of his land which was due to the fact that the land was known to be within the area designated for the reservation and was certain to be taken for it. *Smith v. Commonwealth*, 259.

Rulings and instructions and a striking out of evidence by the judge presiding at the trial of a petition to recover compensation for a large tract of land on Greylock Mountain taken under St. 1898, c. 543, for the Greylock State Reservation, which were held not to have been prejudicial to the petitioner. *Ibid.*

A claim for damages for real estate taken for highway purposes under a statute providing for the abolition of certain grade crossings, to recover which a petition for an assessment by a jury is pending, is not taxable as a debt under St. 1909, c. 490, Part I, § 4, cl. 2, providing for the taxation of "other debts due the person to be taxed more than he is indebted or pays interest for." *Powers v. Worcester*, 471.

In Contract.

Statement and application of the rules governing the recovery of prospective profits in an action of contract where the plaintiff makes a claim for damage to his business. *John Hetherington & Sons, Ltd., v. William Firth Co.* 8.

In Tort.

Where, at the trial of an action of tort by a dressmaker for the loss of certain gowns, it appears that the gowns may have no market value because they were made to order for a certain customer, evidence of the cost of the labor and material used in their construction is competent upon the question of damages. *Murray v. Postal Telegraph-Cable Co.* 188.

In an action in the nature of trespass *quare clausum fregit* by the owner of a farm, on which he lives with his family, against a street railway corporation, for the wrongful maintenance on the plaintiff's land of poles and guy wires supporting wires transmitting a powerful current of electricity from

a power house of the defendant, the character of the defendant's structures and of its acts in sending a dangerous current of electricity over the plaintiff's land are proper matters for consideration by the jury in the assessment of damages. *Phelps v. Berkshire Street Railway*, 49.

Proper rules for the assessment of damages in an action for wrongfully causing the discharge of the plaintiff from employment as a laster in a shoe factory by serving on the plaintiff's employer a notice of an assignment of wages to the defendant which was made by a different person of the same name, and by refusing unjustifiably to withdraw the notice after information from the plaintiff of the mistake. *Lopes v. Connolly*, 487.

Elements of damage recoverable in an action by a manufacturing corporation, which had a right to maintain a canal to draw water for its mill from a certain pond subject to the right of an ice company to cut and take ice from the pond and the canal, against the ice company for alleged negligence in constructing and maintaining a runway through the bank of the canal. *Moore Spinning Co. v. Boston Ice Co.* 364.

Statement of the rule for the assessment of damages in an action of tort for damages alleged to have been caused by false and fraudulent representations of the defendant in the sale of live stock and a milk route and the negotiating of a lease of a dairy farm to the defendant. *Thomson v. Pentecost*, 223.

Proper comments by a trial judge to the effect that difficulty in ascertaining with exactness the extent of damages should not lead the jury to exempt the defendant from any part of the consequences of his wrongful act. *Ibid.*

Limitation by Contract.

Contract, limiting liability of a carrier for loss of goods, which was made by the proprietor of a machine shop in returning to their owner parts of an automobile sent to him for repair, was held to be binding upon the owner. *Peirce v. American Express Co.* 383.

In Recoupment.

In an action on a promissory note given as part payment for a soda fountain to be installed by the plaintiff, the defendant, who has not filed an answer in recoupment, cannot claim an allowance for damages caused by carelessness of the plaintiff in the installation of the fountain. *Puffer Manuf. Co. v. Krum*, 211.

Fact, that there could not be both a recovery by the plaintiff in an action of deceit and also a recovery upon a plea in recoupment of damages in a cross action upon a promissory note, was held to render immaterial an exception by the defendant in the cross action to certain evidence on the question of fraud. *Townsend v. Niles*, 524.

New Trial concerning.

As to a motion for a new trial on the question of damages only, based on the ground that damages awarded were inadequate, it was said, that only in

Damages (continued).

exceptional and extremely rare instances will inadequacy of damages not be so interwoven with liability that justice can be done without a new trial upon the whole case. *Simmons v. Fish*, 568.

An order purporting to grant a motion by a plaintiff in an action for personal injuries, that an inadequate verdict as to damages be set aside and that a new trial be ordered on the question of damages only, is of no effect and does not set aside the verdict. *Ibid.*

Verdict for \$200 in an action of tort for the loss of an eye as to which it was said that in itself it was almost a conclusive demonstration that it was the result of an improper compromise in regard to the vital principles which should have controlled the decision, and that setting it aside because it was inadequate and granting a new trial on the question of damages only would be an arbitrary exercise of discretion which would exceed the powers of the trial judge. *Ibid.*

DECEIT.

The rule of *Poland v. Brownell*, 181 Mass. 188, that where goods are duly examined by a buyer he cannot hold the seller liable for "mere seller's statements," is not to be extended. *Townsend v. Niles*, 524.

In an action to recover damages for a false and fraudulent representation of the defendant, that he and his partner, who carried on a retail and wholesale pork business in a stall in a general market and a storehouse on another street, were doing a business of \$150,000 a year, it cannot be said as matter of law that the fullest examination of the premises in which such a business was carried on would have made manifest the truth or falsity of the representation. *Ibid.*

In such action it was held that, upon conflicting evidence, the question, whether the defendant's representation or other considerations induced the plaintiff to purchase, properly was left to the jury. *Ibid.*

Fact that there could not be both a recovery by the plaintiff in the action of deceit and also a recovery upon a plea in recoupment of damages in a cross action upon a promissory note was held to render immaterial an exception by the defendant in the cross action to certain evidence on the question of fraud. *Ibid.*

An insurance company may maintain an action for deceit to recover an amount paid to the defendant on an alleged loss of property by fire under a policy issued by the plaintiff, on showing that the plaintiff was induced to make the payment by misrepresentations of material facts concerning the property knowingly made by the defendant in the proof of loss signed and sworn to by him with the intention that they should be acted upon by the plaintiff. *Palatine Ins. Co. v. Kehoe*, 426.

Statement of the rule for the assessment of damages in an action of tort for damages alleged to have been caused by false and fraudulent representations of the defendant in the sale of live stock and a milk route and the negotiating of a lease of a dairy farm to the defendant, and proper comments by the judge to the effect that difficulty in ascertaining with exact-

ness the extent of the damages should not lead the jury to exempt the defendant from any part of the consequences of his fraud. *Thomson v. Pentecost*, 223.

DEED.

Execution and Delivery.

A deed of land, which purports on its face to have been "signed, sealed and delivered in the presence of" a witness whose name is signed thereto, is presumed in the absence of anything appearing to the contrary to have been executed on the day of its date and to have been delivered. *Hall v. Sears*, 185.

Construction.

Construction of a deed with regard to an express reservation therein of a right of way. *Randall v. Grant*, 802.

Effect of acts of parties to a deed, continued for eight years, in showing the true interpretation of a deed. *Ibid.*

Construction of a deed to a city of certain lots of land with buildings thereon from which it appeared that it was the intention of the parties to the deed that the buildings should belong to the grantor if he severed them from the land on or before a certain July 1, and otherwise that they should remain a part of the realty. *Oesting v. New Bedford*, 896.

Validity.

Master's findings on unreported evidence in a suit by a man and his wife of advanced years to set aside a deed for fraud were held not to be plainly wrong. *Crosier v. Kellogg*, 181.

Promise to record a deed was held under the circumstances to have been a valid consideration for an agreement to furnish firewood for life, even if the deed were invalid. *Hall v. Sears*, 185.

DEVISE AND LEGACY.

Vested Interest.

Devise of interest in certain real estate in trust for children and grandchildren of the testator until certain mortgages were paid, which, it was held, vested in interest at the death of the testator and was to vest in possession at the termination of the trust by the payment of the mortgages. *Southard v. Southard*, 847.

Easements included in Devise by Implication.

Private right of way which was held to pass by will as appurtenant to a homestead and a garden connected therewith, and not to be restricted to use for domestic purposes, but to be left to be adapted to the convenience and desires of occupants of the estate from time to time, so that it might

Devise and Legacy (continued).

be used in connection with a theatre afterwards erected where the garden had been. *Gorton-Pew Fisheries Co. v. Tolman*, 402.

Modification by Codicil.

A plain gift in a will will not be modified by uncertain language of a codicil to any greater extent than such language expressly requires. *Lovering v. Balch*, 105.

And therefore, where by his will a testator gave property to a daughter without limitation and then by a codicil, made when the daughter was grievously ill, provided that if she should die leaving no child her husband should have the income from her share during his life, the codicil was held to be intended to apply only if the daughter died childless before the testator. *Ibid.*

"Relation."

A sister-in-law of a testator, named as a legatee, who died before the testator leaving issue surviving the testator, is not a "relation of the testator" within the meaning of R. L. c. 185, § 21. *Worcester Trust Co. v. Turner*, 115.

Lapsed Residuary Legacy.

A share of a residuary bequest which has lapsed by reason of the death of the legatee, being itself a part of the residue, cannot be distributed under the residuary clause and goes to the testator's next of kin as intestate property, unless the will shows a manifest intention of the testator that such a lapsed residuary legacy shall go to increase the shares of the other residuary legatees. In the present case no such intention was shown. *Worcester Trust Co. v. Turner*, 115.

Trust.

A will which included a bequest to a trustee for the benefit of a sister of the testator and in a residuary clause made a division among the "legatees" previously mentioned, was construed to mean that the sister should not receive a share of the residue absolutely, but that what represented her share should go to the trustee for her benefit. *Worcester Trust Co. v. Turner*, 115.

DISTRICT COURT.

See POLICE, DISTRICT AND MUNICIPAL COURTS.

DOG OFFICER.

Wages of a dog officer are to be paid by the day during the term of his actual employment. *O'Neill v. County of Worcester*, 874.

Under R. L. c. 102, § 143, a bill for services as a dog officer in a city must be approved by the mayor of the city as a condition precedent to payment by the county treasurer, and an approval of such a bill by the person who was the mayor of the city when the services were rendered, given after he has ceased to be such mayor, is of no effect. *Ibid.*

DURESS.

Suit by a wife to have set aside deeds procured by her husband through fraud and duress conveying property from her to her daughter and from her daughter to him. *Hoag v. Hoag*, 94.

EASEMENT.

Discussion by SHELDON, J., of the law with regard to easements which, although not expressly described in an instrument of conveyance, pass with the dominant estate by implication because they are reasonably necessary to its use and enjoyment, are open and continuous and are in use at the time of the conveyance. *Gorton-Pew Fisheries Co. v. Tolman*, 402.

Private right of way which was held to pass by will as appurtenant to a homestead and a garden connected therewith, and not to be restricted to use for domestic purposes, but to be left to be adapted to the convenience and desires of occupants of the estate from time to time. *Ibid.*

Construction of a deed with regard to an express reservation therein of a right of way. *Randall v. Grant*, 302.

A conveyance to a railroad corporation of land to be used for its railroad purposes, reserving to the grantor the right of carrying water from his mill pond through a canal across the railroad embankment, if such a canal should be constructed by the railroad corporation in accordance with an agreement between the parties, reserves no easement of a right to carry water through the canal except upon the contingency of such a canal being constructed. *Whitney v. Cheshire Railroad*, 263.

Principle upon which damages are assessed for the taking of land by right of eminent domain by a railroad corporation. *Boston & Maine Railroad v. Hunt*, 128.

Application of such principle to the taking of a meadow with a brook running through it, where the taking was held to include the right of flowage for all purposes. *Ibid.*

Elements of damage recoverable in an action by a manufacturing company, which had a right to maintain a canal to draw water for its mill from a certain pond subject to the right of an ice company to cut and take ice from the pond and the canal, against the ice company for alleged negligence in constructing and maintaining a runway through the bank of the canal. *Moore Spinning Co. v. Boston Ice Co.* 364.

ELEVATED RAILWAY.

One who is within a station used by a corporation operating both a surface and an elevated railway and is passing from one car to another is a passenger of the corporation. *Kelley v. Boston Elevated Railway*, 454.

ELEVATOR.

An employee of a subtenant of a part of a floor of a building, in which there was a freight elevator for the use of the tenants who operated it in the

Elevator (*continued*).

transportation of materials, was held not to be entitled under the circumstances to recover from the owner of the building for an injury caused by the elevator not resting evenly on the floor of the well before being started. *Baum v. Ahlborn*, 336.

EMINENT DOMAIN.

Principle upon which damages are assessed for the taking of land by right of eminent domain by a railroad corporation. *Boston & Maine Railroad v. Hunt*, 128.

Application of such principle to the taking of a meadow with a brook running through it, where the taking was held to include the right of flowage for all purposes. *Ibid*.

EMPLOYER'S LIABILITY.

See that subtitle under NEGLIGENCE.

EQUITABLE RESTRICTIONS.

An enforceable restriction in a deed of land, which limits the buildings to be erected on the premises to "a dwelling house to be used exclusively as a residence for a private family" and the necessary outbuildings, is violated by letting rooms in a dwelling house on the land to boarders and lodgers averaging in number about twelve at a time and staying for periods of about two weeks. *Sayles v. Hall*, 281.

EQUITY JURISDICTION.

Laches.

A defendant in a suit in equity cannot rely as of right upon a defense that the plaintiff has been guilty of laches sufficient to bar the suit unless he sets that defense up in his answer or in a plea. *Kerashikian v. Johnson*, 135; *Davis v. Downer*, 573.

Delay by a wife from January 5 to July 8 in bringing a suit against her husband to have set aside a conveyance of real estate which she alleged the defendant procured from her through fraud and duress, where it appears that the plaintiff lived with her husband until April and that while thus living with him she was under his influence and reasonably entertained fear as to his future conduct, does not as matter of law constitute such laches as to bar the suit. *Hoag v. Hoag*, 94.

A plaintiff was held under the circumstances not to be guilty of laches in bringing in 1909 a suit in equity for a mandatory injunction directing the defendant to remove a building which in 1905 he had erected beyond the boundary line between his land and that of the plaintiff, which then was owned by one who conveyed it to the plaintiff in 1907. *Kerashikian v. Johnson*, 135.

Suit in equity for the specific performance of a covenant by a railroad corporation to build a canal, which was dismissed because the plaintiff had failed for an unreasonably long time to do acts which were conditions precedent to performance by the defendant, and had unreasonably delayed the beginning and the prosecution of the suit. *Whitney v. Cheeshire Railroad*, 268.

Statute of Frauds.

The statute of frauds was held not to prevent the giving of relief in a suit in equity to compel the completion, by a formal conveyance of land, of an imperfect execution of a power under a will. *Coates v. Lunt*, 814.

Certain facts which, in a suit in equity to enforce an oral agreement for the conveyance of land, were held to estop the defendants from setting up the statute of frauds as a defense. *Davis v. Downer*, 578.

Statute of Limitations.

When the statute of limitations is effectual to bar a suit in equity by the trustee of an estate against the trustee of another estate to obtain relief from fraudulent acts of a person who formerly was trustee of both estates, see *Bremer v. Williams*, 256.

Time, when the right accrues to begin a suit for the recovery, under R. L. c. 118, § 78, now St. 1907, c. 576, § 8, of amounts of premiums paid in fraud of his creditors by the insured on a policy of life insurance, and when the period of the statute of limitations begins, is the date of the death of the insured. *York v. Flaherty*, 35.

Res Judicata.

A decree, dismissing a petition by a wife for separate maintenance because of condonation by the wife of certain cruelty on the part of the husband which she had alleged as the ground for her petition, is not conclusive proof of ratification by her of a deed which she had given under duress by him and for his benefit at the time of the acts of cruelty alleged in the petition, and does not bar a suit in equity by her to have the deed set aside. *Hoag v. Hoag*, 94.

Estoppel.

In a suit in equity by a member of a partnership, to enforce an oral agreement for the conveyance to the partners of certain real estate which had been conveyed to one of the defendants without consideration by the mother of the partners, facts, which showed that the partners had been induced to make expenditures upon the land and to change their situation materially in reliance upon performance of the oral agreement, were held to preclude the defendants from setting up the statute of frauds as a defense. *Davis v. Downer*, 578.

The standing by in silence of a wife during the completion of a conveyance of property from her through her daughter as a conduit to her husband, was held not to estop the wife from maintaining a suit in equity to have the conveyance set aside as obtained through fraud and duress. *Hoag v. Hoag*, 94.

Mandatory Injunction.

Suit in which a mandatory injunction was granted directing the defendant to remove a building which he had built a few feet over the boundary line between his land and the plaintiff's. *Kershishian v. Johnson*, 135.

Specific Performance.

Suit in equity for the specific performance of a covenant by a railroad corporation to build a canal, which was dismissed because the plaintiff had failed for an unreasonably long time to do acts which were conditions precedent to performance by the defendant, and had unreasonably delayed the beginning and the prosecution of the suit. *Whitney v. Cheshire Railroad*, 263.

In a suit in equity by a member of a partnership to enforce an oral agreement for the conveyance to the partners of certain real estate which had been conveyed to one of the defendants without consideration by the mother of the partners, facts, which showed that the partners had been induced to make expenditures upon the land and to change their situation materially in reliance upon the performance of the oral agreement, were held to preclude the defendants from setting up the statute of frauds as a defense. *Davis v. Downer*, 573.

Accident or Mistake.

Suit in equity against a city by one who had conveyed land with buildings thereon to the defendant by a deed which provided that, if the buildings were removed before a July 1, they should belong to the plaintiff, and otherwise should remain a part of the realty, and who had not removed the buildings before July 1, in which the plaintiff sought relief from forfeiture of the buildings because of alleged accident or mistake on his part as to votes and actions of the mayor and board of aldermen of the defendant, was held to have been dismissed properly. *Oesting v. New Bedford*, 396.

To enforce Resulting Trust.

Suit in equity by a member of a partnership to compel the conveyance to the partners of a certain parcel of real estate, which had been conveyed to one of the defendants without consideration by the mother of the partners, in which it was held that the facts showed a resulting trust for the benefit of the partnership and that the plaintiff was entitled to relief. *Davis v. Downer*, 573.

Partnership Accounting.

Settlement of accounts between two partners which was held to be a final settlement into which all claims were merged, so that a suit for an accounting between the partners could not be maintained thereafter. *Coffey v. Coffey*, 480.

To compel Restitution of Unjust Enrichment.

Where a person, who is the sole trustee of two separate estates, pays certain taxes due from one of the estates with money embezzled by him from the

other estate, a new trustee of the estate from which the money was embezzled may maintain a suit in equity to recover its amount from a new trustee of the estate which was thus unjustly enriched. *Bremer v. Williams*, 256.

In such a suit, where the defendant sets up the statute of limitations, the period, during which the dishonest person was the trustee of both estates before his dishonesty was discovered, is to be deducted from the six year period of limitation, which begins to run only when there is some one by whom and a different person against whom the claim can be enforced. *Ibid*.

To prevent Unreasonable Restraint upon Alienation of Trust Property.

It was held in a suit in equity by trustees for instructions, that a trust under a will, whose termination was postponed until the payment and discharge of mortgages originally upon real estate included in it and also of such mortgages as the trustees at any time subsequently in their discretion might place thereon, should be terminated because it rendered the property inalienable for an unreasonably long period. *Southard v. Southard*, 847.

To enjoin Unfair Treatment of Stockholder by Corporation.

Conduct of the directors of a corporation toward a stockholder which was held to be so lacking in the good faith which the fiduciary nature of their powers required as to entitle the stockholder to maintain a suit in equity to enjoin their action. *Adams v. Protective Union Co.* 172.

To redeem from a Tax Sale.

In a suit in equity by the owner of land against a non-resident who had purchased it at a tax sale, it was held that, although a formal tender for redemption was made more than two years, and the suit was brought more than three years, after the sale, yet as the defendant had not complied with the requirements of R. L. c. 18, § 45, as to the appointing of an agent and the recording of identifying information regarding him, the court should consider whether all the circumstances were such as to make it equitable that the plaintiff should be allowed to redeem. *Davidson v. Stafford*, 145.

To compel Completion of Imperfect Exercise of Power under Will.

Where one, who by the provisions of a will is given property in trust with a power to convey it, makes an attempt to carry out a fixed intent to execute the power by a conveyance for a sufficient consideration and the attempt falls short of accomplishing the purpose by reason of some defect in the instrument of conveyance, the person to whom the property was attempted to be conveyed by a suit in equity may compel a complete performance of the power if no rights of other persons with superior equities have intervened. *Coates v. Lunt*, 314.

To recover Premiums paid on Life Insurance Policy in Fraud of Creditors.

Time, when the right accrues to begin a suit for the recovery, under R. L. c. 118, § 78, now St. 1907, c. 576, § 3, of amounts of premiums paid by the

Equity Jurisdiction (continued).

insured in fraud of his creditors on a policy of life insurance, and when the period of the statute of limitations begins, is the date of the death of the insured. *York v. Flaherty*, 85.

The administrator of an estate which has been declared insolvent is the proper person to sue for the amount of a policy of life insurance upon the life of the decedent which before his death he had transferred in fraud of his creditors, and also under St. 1907, c. 576, § 73, for premiums paid by the insured in fraud of his creditors upon a policy which he had transferred to his wife. *Ibid.*

In such a suit against the widow of the insured, she cannot successfully contend that a loan, made by the insurance company to the insured, to secure the payment of which the company had taken a note signed by the insured and the defendant and an assignment of the policy, was in effect a debt owed to her by the estate which she might set off against the claim for the premiums fraudulently paid. *Ibid.*

In such a suit premiums which were paid before the policy was transferred by the insured to his wife cannot be recovered if it does not appear that when the insured paid the premiums he intended to make the transfer. *Ibid.*

A charge of interest against an insurance company, which was withholding the payment of the proceeds of a policy of insurance pending the adjustment of such a suit, was held to have been justifiable. *Ibid.*

To relieve from Results of Fraud or Duress.

In a suit in equity by a wife against her husband to have declared void deeds from her to her daughter and from the daughter to the defendant conveying the plaintiff's interest in certain property, on the ground that the plaintiff was caused to execute and deliver the deed to the daughter through fraud and duress of the defendant, the mere fact, that the plaintiff stood by and saw the daughter convey the property to the defendant and made no objection, does not as matter of law estop her from maintaining the suit where it appears that the daughter had no interest in the matter but acted simply as a conduit. *Hoag v. Hoag*, 94.

Where through fraud and duress a husband procures from his wife a conveyance of her interest in certain property through a third person to himself, and he and she thereupon together occupy the property as a home for some months during which he makes certain expenditures "in the ordinary upkeep and care of the property" with no expectation that he would be repaid such expenditures and no request for such repayment, in a suit by the wife against him to set aside the conveyance, he is not entitled to have any part of such expenditures awarded to him in a final decree which directs the conveyance to be set aside. *Ibid.*

Delay by the wife from January 5 to July 8 in bringing such a suit was held under the circumstances not to constitute such laches as to bar the suit. *Ibid.*

A decree, dismissing a petition by a wife for separate maintenance because of condonation by the wife of cruelty on the part of the husband which she

had alleged as the ground for her petition, is not conclusive proof of ratification by her of a deed which she had given under duress by him at the time of the acts of cruelty alleged in the petition, and does not bar a suit in equity by her to have the deed set aside. *Hoag v. Hoag*, 94.

Suit by the trustee of an estate to compel restitution of funds of the estate fraudulently expended by a former trustee for the benefit of another estate of which such fraudulent trustee also was trustee. *Bremer v. Williams*, 256.

Master's findings on unreported evidence in a suit of a man and his wife of advanced years to set aside a deed for fraud were held not to be clearly wrong. *Crosier v. Kellogg*, 181.

To relieve against Forfeiture.

Suit in equity against a city by one, who had conveyed land with buildings thereon to the defendant by a deed which provided that, if the buildings were removed before a July 1, they should belong to the plaintiff and that otherwise they should remain a part of the realty and who had not removed the buildings before July 1, in which the plaintiff sought relief from forfeiture of the buildings because of alleged accident or mistake on his part as to votes and actions of the mayor and board of aldermen of the defendant. *Oesting v. New Bedford*, 396.

To restrain Maintenance of Stable without License.

Under R. L. c. 102, § 71, a suit in equity may be maintained in the Superior Court by a city whose population exceeds twenty-five thousand to restrain the erection, occupation or use of a building for a stable without a license from the board of health, where there is a reasonable certainty that the building in question is to be occupied and used as a stable unlawfully, although no actual injury to the public has been inflicted at the time the bill is filed. *Worcester Board of Health v. Tupper*, 378.

In such a suit in equity, where it appears that the defendant has erected a building which he intends to occupy and use as a stable for horses, it is no defense to show that the board of health acted arbitrarily and unjustly in refusing the defendant a license, nor is it material for the defendant to show the excellent sanitary condition of the building or its complete plumbing and appointments and its mode of construction, nor to show that stables of other persons in more densely populated sections of the city have been licensed. *Ibid.*

Such a suit must be brought by the city itself and not by the members of its board of health. *Ibid.*

To enjoin Continuance of Trespass.

Interference by a court of equity to prevent the continuance of repeated trespasses to real estate which were being committed under a claim of an adverse right persistently asserted, where the wrongful acts separately may not have impaired materially the use and enjoyment of the property affected, see *Boston & Maine Railroad v. Hunt*, 128.

Equity Jurisdiction (*continued*).

One, who has attempted to interfere with the rights or to appropriate the property of an owner of land and has changed the condition of the owner's real estate without right, without excuse and without being misled by the speech, silence or conduct of the owner, can be compelled by a suit in equity to undo so far as possible that which he wrongfully has done affecting the owner and to pay damages. *Kershishian v. Johnson*, 135.

Application of the foregoing principles in a suit in equity in which the plaintiff sought the removal of a building which the defendant, an owner of land adjoining the plaintiff's, had caused to be built beyond the boundary line. *Ibid.*

To restrain Publication of Private Letters.

Review by RUGG, C. J., of the authorities relating to the protection by courts of equity of the right of the author of an ordinary private letter, which is without value as literature, to restrain its publication. *Baker v. Libbie*, 599.

The executor of the will of the author of friendly letters, which do not possess the qualities of literature and were written to a cousin about domestic and business affairs, referring to household matters, to health and to the work that the writer was doing, may maintain a suit in equity, to restrain the publication of such letters or their multiplication in any way in whole or in part, and to compel the holder of the letters to allow the plaintiff to make copies of them within a reasonable time; but he is not entitled to a decree restraining the sale and transfer of such letters as manuscripts. *Ibid.*

Interest.

A charge of interest against an insurance company which was holding the amount of the proceeds of an insurance policy pending the adjustment of a suit between the administrator of the estate of the insured and the insured's widow and son and the company, was held to be proper. *York v. Flaherty*, 35.

EQUITY PLEADING AND PRACTICE.

Parties.

The city, and not the members of its board of health, is the proper party plaintiff in a suit under R. L. c. 102, § 71, to restrain the unlicensed erection, occupation or use of a building for a stable in a city whose population exceeds twenty-five thousand. *Worcester Board of Health v. Tupper*, 378.

The administrator of an estate which has been declared insolvent is the proper person to sue for the amount of a policy of life insurance upon the life of the decedent which before his death the insured had transferred in fraud of his creditors, and also under St. 1907, c. 576, § 73, for premiums paid by the insured in fraud of his creditors upon a policy which he had transferred to his wife. *York v. Flaherty*, 35.

Owner of land which, while it stood in the name of another for him, was sold at a tax sale to a non-resident who failed to comply with the require-

ments of R. L. c. 13, § 45, as to the appointment of an agent and the registering of identifying information regarding him, after he has taken the record title in himself more than two years after the sale, is a proper person to bring a suit in equity for redemption from the tax title. *Davidson v. Stafford*, 145.

Answer.

A defendant in a suit in equity cannot rely as of right upon a defense that the plaintiff has been guilty of laches sufficient to bar the suit unless he sets that defense up in his answer or in a plea. *Kershiskian v. Johnson*, 185; *Davis v. Downer*, 573.

Interlocutory Decree.

An appeal from an interlocutory decree overruling a demurrer to a bill in equity cannot be brought before this court by a bill of exceptions alleging exceptions to the rulings of the trial judge, who after overruling the demurrer heard the case on the issues raised by the answer. *Worcester Board of Health v. Tupper*, 378.

Master.

In a suit in equity a motion to recommit a master's report with an order to report the evidence upon which certain findings of fact made by the master were based is addressed to the sound discretion of the trial judge. *Crosier v. Kellogg*, 181.

In a suit in equity, where the case is referred to a master under an order of court which does not require him to report the evidence but only to report his findings with such facts and questions of law as either party may request, the master's findings of fact upon unreported evidence cannot be revised upon exceptions taken to his report. *Ibid*.

Findings of a master which were held not to be open to revision on an appeal from a final decree because the evidence on which they were based was not reported and they were not in themselves inconsistent. *Hughes v. Northampton Street Railway*, 206.

Findings by Trial Judge.

The findings of fact contained in a report to this court by a judge of the Superior Court who has heard a suit in equity which was tried largely on oral testimony, although some of them may appear extreme, will not be disturbed unless it appears from the report that they clearly were wrong. *Adams v. Protective Union Co.* 172.

Exceptions to Rulings of Judge.

An appeal from an interlocutory decree overruling a demurrer to a bill in equity cannot be brought before this court by a bill of exceptions alleging exceptions to the rulings of the trial judge, who, after the overruling of the demurrer, heard the case on the issues raised by the answer. *Worcester Board of Health v. Tupper*, 378.

Equity Pleading and Practice (*continued*).

Where, at the trial of a suit in equity, evidence which was incompetent for the purpose for which it was offered was excluded by the trial judge on that ground, an exception to such exclusion cannot be sustained on the ground that the evidence was admissible for the purpose of impeaching the testimony of the principal witness on the other side by showing bias or prejudice on his part, if it was not offered for that purpose. *Worcester Board of Health v. Tupper*, 878.

Report.

The findings of fact contained in a report to this court by a judge of the Superior Court who has heard a suit in equity which was tried largely on oral testimony, although some of them may appear extreme, will not be disturbed unless it appears from the report that they clearly were wrong. *Adams v. Protective Union Co.* 172.

Disposition of a suit in equity which was reported to this court by a judge of the Superior Court upon a memorandum, after the making of which a decree had been ordered and an appeal taken. *Boston & Maine Railroad v. Hunt*, 128.

Appeal.

Findings of a master which were held not to be open to revision on an appeal from a final decree because the evidence on which they were based was not reported and they were not in themselves inconsistent. *Hughes v. Northampton Street Railway*, 206.

An appeal from an interlocutory decree overruling a demurrer to a bill in equity cannot be brought before this court by a bill of exceptions alleging exceptions to the rulings of the trial judge, who, after overruling the demurrer, heard the case on the issues raised by the answer. *Worcester Board of Health v. Tupper*, 878.

Disposition of a suit in equity which was reported to this court by a judge of the Superior Court upon a memorandum after the making of which a decree had been ordered and an appeal taken. *Boston & Maine Railroad v. Hunt*, 128.

ERROR, WRIT OF.

A petition for a writ of review of a judgment of the Superior Court, which was discontinued by the petitioner by leave of court without costs before any trial was had upon it, does not estop the petitioner from maintaining a petition for a writ of error to reverse the same judgment upon substantially the same grounds as those alleged in his petition for a writ of review. *Karrick v. Wetmore*, 578.

ESTOPPEL.

Decrees of the Probate Court, confirming certain accounts of trustees in which certain items were treated as capital, were held to bar a contention by one who had succeeded to the interest of certain beneficiaries who had assented to the accounts that the items should have been treated as income. *Southard v. Southard*, 347.

Acceptance by sisters of legacies given to them in the will of their father, and releases given by them to their brother as executor of the father's will, were held not to prevent them from maintaining actions against their brother for a sum promised to them by him if they would withdraw appeals from an allowance of the will by the Probate Court. *Silver v. Graves*, 26.

Fact, that, under protest, one who had acquired certain property after April 1 included it in a list filed by him with certain assessors of taxes on May 13, does not estop him from claiming an abatement of a tax assessed on such property. *Powers v. Worcester*, 471.

A petition for a writ of review of a judgment of the Superior Court, which was discontinued by the petitioner by leave of court without costs before any trial was had upon it, does not estop the petitioner from maintaining a petition for a writ of error to reverse the same judgment upon substantially the same grounds as those alleged in his petition for a writ of review. *Karrick v. Wetmore*, 578.

After a husband by duress and fraud has procured from his wife a deed of her property to his daughter, the fact that thereafter the wife stood by and saw the daughter convey the same property to him does not estop the wife from maintaining against her husband a suit in equity to have the deeds set aside. *Hoag v. Hoag*, 94.

In a suit in equity by a member of a partnership to enforce an oral agreement for the conveyance to the partners of certain real estate, which had been conveyed to one of the defendants without consideration by the mother of the partners, facts, which showed that the partners had been induced to make expenditures upon the land and to change their situation materially in reliance upon the performance of the oral agreement, were held to preclude the defendants from setting up the statute of frauds as a defense. *Davis v. Downer* 578.

EVIDENCE.

Judicial Notice.

Character of the business of a corporation which furnishes messengers to deliver parcels, as to the value of the parcels accepted for delivery, is not a matter of common knowledge of which a judge in charging a jury should take judicial notice. *Murray v. Postal Telegraph-Cable Co.* 188.

It is a matter of common knowledge of which a court may take judicial notice that valuable services frequently are rendered to business, banking, insurance and public service as well as to charitable corporations by their officers under circumstances which are inconsistent with any presumption that compensation is to be paid. *Marcy v. Shelburne Falls & Colrain Street Railway*, 197.

Presumptions and Burden of Proof.

The presumption of fact, which exists in this Commonwealth, that a negotiable promissory note given for an unsecured simple contract debt was given

Evidence (continued).

- and taken in payment of that debt, is not to be extended as of course to the case of a debt secured by a lien. *Cary Brick Co. v. Wheeler*, 338.
- Application of the foregoing proposition of law in a petition for the enforcement of a mechanic's lien where the respondent, claiming credit on account of a promissory note given by him to the petitioner but never paid, was held to have the burden of proving that the note was given and taken as payment. *Ibid.*
- It is a matter of common knowledge of which a court may take judicial notice that valuable services frequently are rendered to business, banking, insurance and public service as well as charitable corporations by their officers under circumstances which are inconsistent with any presumption that compensation is to be paid. *Marcy v. Shelburne Falls & Colrain Street Railway*, 197.
- Recital, in a decree of fence viewers under R. L. c. 83, § 6, that due notice had been given to an adjoining owner of hearings for assessing the value of a part of a partition fence, is evidence that such notice was given. *Leonard v. Lyon*, 248.
- A decree, dismissing a petition by a wife for separate maintenance because of condonation by the wife of cruelty on the part of the husband which she had alleged as the ground for her petition, is not conclusive proof of ratification by her of a deed which she had given under duress by him and for his benefit at the time of the acts of cruelty alleged in the petition. *Hoag v. Hoag*, 94.
- A deed of land which purports on its face to have been "signed, sealed and delivered in the presence of" a witness whose name is signed, is presumed in the absence of anything appearing to the contrary to have been executed on the day of its date and to have been delivered. *Hall v. Sears*, 185.
- Mutilation of a contract in writing was held to be only one factor, not in itself conclusive, to be considered on the issue of whether the contract was cancelled. *John Hetherington & Sons, Ltd., v. William Firth Co.* 8.
- In order to prove by evidence purely circumstantial that the crime charged in an indictment was committed by the defendant, it is not necessary to show that the defendant's opportunity to commit the crime was exclusive, where the circumstances, although tending to show an opportunity of others, point to the defendant as the actual offender. *Commonwealth v. Taylor*, 448.
- A report of a decision of a judge of the Land Court, filed by him in the Superior Court on an appeal from his decision while St. 1905, c. 288, was in force, has no value as evidence if it contains only a ruling of law. *Blake v. Rogers*, 588.
- In an action against a railroad for injuries due to the door of a passenger car shutting on the plaintiff's hand, the fact that the door did not stay caught back after it was opened was held under the circumstances to be evidence that its failure to do so resulted from negligence of the defendant. *Kellogg v. Boston & Maine Railroad*, 324.
- Action by a boy in a can making factory for injuries caused by the automatic starting of a machine, where there was held to have been evidence

of due care on the part of the plaintiff although the machine had started automatically once before he was hurt, and evidence of negligence on the part of the defendant, because if the machine had been in order it would not have started and because its starting was unexplained. *Chiucciariello v. Campbell*, 582.

Fact that the goods in a sealed car were injured by fire while in a railroad freight yard was held to be evidence warranting a submission to a jury of the question, whether the only reasonable origin of the fire involved negligence of employees of the railroad corporation. *P. Garvan, Inc., v. New York Central & Hudson River Railroad*, 275.

At the trial before a judge without a jury of an action against a street railway corporation for personal injuries sustained by an unusual jolt of a car when the plaintiff was a passenger thereon, the jolt, if unexplained, was held to be evidence of the defendant's negligence, but not to change the burden of proof which still was upon the plaintiff, so that the judge might find on evidence warranting such findings facts which would show that the defendant was not liable. *Webber v. Old Colony Street Railway*, 482.

Before a declaration made by a person afterwards deceased can be admitted as evidence under R. L. c. 175, § 66, the presiding judge must find that the declaration was made in good faith, before the commencement of the action and upon the personal knowledge of the declarant, and the burden of establishing such facts is upon the party offering such evidence. *Carroll v. Boston Elevated Railway*, 500.

Specific instances which were held to justify a finding that a horse had vicious habits. *Scanlon v. Cavanaugh*, 291.

At the trial of an action of contract, where upon issues of fact the evidence is conflicting and the burden of proof rests on the plaintiff, the jury must pass upon the credibility and the weight of the testimony and a request that a verdict be ordered for the plaintiff manifestly should be refused. *Marcy v. Shelburne Falls & Colrain Street Railway*, 197.

The question, in an action under St. 1906, c. 463, Part I, § 63, as amended by St. 1907, c. 392, against a railroad corporation by the administrator of the estate of one who was killed at the crossing of the railroad with a highway at grade, whether the plaintiff's intestate took precautions for his safety at the crossing, was held to have been left on the evidence entirely to conjecture. *Rodrigues v. New York, New Haven, & Hartford*, 805.

In an action upon an agreement in writing by the defendant to receive and pay for certain volumes, a year's subscription to a certain periodical to be given to the defendant free, it was held that a verdict should not have been ordered for the plaintiff for the full contract price, because there was evidence that the periodical was sent to the defendant only for two weeks. *Friedman v. Pierce*, 419.

In an action of contract against a stockbroker by a customer for a failure of the defendant to fulfil orders to buy and sell stock for the plaintiff upon margin, after the plaintiff had proved payments to and acceptance by the defendant of sums of money for the purpose alleged, the burden was on

Evidence (continued).

the defendant to show that the money had been used in the manner authorized in the agreement with the plaintiff. *Greene v. Corey*, 536.

Facts in evidence in an action against a corporation for injuries caused by the plaintiff's horse being thrown down by wires stretched across a highway were held to warrant an inference that the defendant and the corporation which was responsible for the wires being so strung were identical. *Murphy v. Fred T. Ley & Co., Inc.*, 371.

In an action by a landlord against a tenant at will for rent, if the defendant relies upon an alleged waiver by the plaintiff of the requirement of a notice under R. L. c. 129, § 12, the burden of proving such a waiver is on the defendant. *Leavitt v. Maykell*, 55.

Facts which were held not to amount to such a waiver as matter of law. *Ibid.*

Where, in an action of tort for personal injuries, a defendant, who is shown to have been at fault, sets up the defense of *volenti non fit injuria*, alleging that the plaintiff, knowing of the danger to which his injury was due, voluntarily incurred the risk, this is an affirmative defense, which must be pleaded as such by the defendant, and the burden of proving it is on him. *Leary v. William G. Webber Co.* 68.

Matter of Conjecture.

The question, in an action under St. 1906, c. 463, Part I, § 63, as amended by St. 1907, c. 392, against a railroad corporation by the administrator of the estate of one who was killed at the crossing of the railroad with a highway at grade, whether the plaintiff's intestate took precautions for his safety at the crossing, was held to have been left on the evidence entirely to conjecture. *Rodrigues v. New York, New Haven, & Hartford Railroad*, 305.

Circumstantial.

In order to prove by evidence wholly circumstantial that the crime charged in an indictment was committed by the defendant, it is not necessary to show that the defendant's opportunity to commit the crime was exclusive, where the circumstances, although tending to show an opportunity of others, point to the defendant as the actual offender. *Commonwealth v. Taylor*, 443.

Competency.

What evidence is competent to show the value of a dress which has no market value. *Murray v. Postal Telegraph-Cable Co.* 188.

As to what evidence is competent, at the trial of an indictment for perjury, to prove the making by the defendant of the statements alleged to have been false. *Commonwealth v. Shooshanian*, 123.

In a suit in equity by an administrator seeking to establish his rights to certain shares of the capital stock of a corporation which he alleged were owned by the intestate at the time of his death, evidence introduced by the defendant tending to show that, two years after the plaintiff's intestate practically had retired from business, he filed a voluntary petition in

bankruptcy and that in the sworn schedules of his assets the shares in question were not mentioned, is competent and material. *Hughes v. Northampton Street Railway*, 206.

In an action by the wife of a tenant for personal injuries caused by a defective temporary step provided by the landlord, it is competent for the plaintiff to testify that, although she thought the step was not safe, she relied on assurances by the landlord that it would be made so and thought herself safe in using it if she took especial care, and that she was taking such care when she was injured. *Ward v. Blouin*, 140.

"Rider" issued by an insurance company but never attached to a policy of fire insurance to which it referred, was held properly to have been admitted in evidence without the policy, which had been burned, in an action of deceit by the company against the insured to recover money paid when the property insured was lost. *Palatine Ins. Co. v. Kehoe*, 426.

In an action of deceit by an insurance company against one who was alleged to have procured fraudulently from the plaintiff payment of a loss alleged to have been sustained under a policy of fire insurance, the plaintiff, to impeach testimony of the defendant and of her husband, was permitted to introduce evidence of statements made to a deputy chief of the district police upon an official inquiry to investigate the fire, which this court held to be admissible for the purpose offered and also as an admission by the plaintiff. *Ibid.*

Report of the detective department of the district police was held inadmissible in an action against a railroad corporation by one whose goods had been injured by fire while they were in the possession of the defendant as a carrier. *P. Garvan, Inc., v. New York Central & Hudson River Railroad*, 275.

Certain documents which were held not to be competent evidence to contradict witnesses who had testified for the Commonwealth in a prosecution for violation of R. L. c. 56, §§ 57, 58, regulating the sale of milk. *Commonwealth v. Phelps*, 109.

At the trial of an action against a street railway corporation for personal injuries received by a laborer upon a highway, a statement signed for the defendant by one of its witnesses was improperly admitted in evidence in redirect examination after the plaintiff had inquired regarding the statement in cross-examination. *Flaherty v. Boston & Northern Street Railway*, 321.

Relevancy and Materiality.

Testimony of superintendents of a defendant corporation which operated both surface and elevated railways, which was held admissible in an action by a passenger injured while passing from one car to another in a station of the defendant. *Kelley v. Boston Elevated Railway*, 454.

Interrogatories and cross-interrogatories and answers thereto which were held to be material in an action against a stockholder by a customer for breach of contracts to buy and sell on margin. *Greene v. Corey*, 536.

Testimony of the plaintiff at the trial of an action by a customer against a stockbroker for breach of contracts to purchase and sell securities upon

Evidence (continued).

margin for the plaintiff, which was held to have been material on the question whether certain releases relied on by the defendant were procured from the plaintiff by fraud. *Greene v. Corey*, 586.

Evidence which was held properly to have been admitted, at the trial of an action against a corporation by its president to recover the value of special services rendered, to show the state of mind of the members of the board of directors of the corporation as to whether they understood that the services were to be paid for or were rendered in the plaintiff's capacity as an officer of the defendant. *Marcy v. Shelburne Falls & Colrain Street Railway*, 197.

At the trial of an action by an employee of a sleeping car company against a railroad company to recover for injuries caused by his being thrown from the top of a car by the jar caused by an engine being backed into it, evidence of a custom of conductors of the defendant to give warning to men working on the tops of cars of the fact that an engine was about to be attached was held to be admissible. *Kean v. New York Central & Hudson River Railroad*, 449.

Evidence of the posting of a regulation by a railroad corporation which was held to be relevant, in an action for the death of a passenger who met his death while violating such regulation, but who was not shown to have known of the regulation, on the question whether employees of the corporation, who knew and relied upon such posting, were grossly negligent. *Renaud v. New York, New Haven, & Hartford Railroad*, 553.

In an action by an employee against a railroad corporation, evidence that certain rules of the defendant were disregarded was not admissible upon the question of the plaintiff's due care, it not appearing that the plaintiff knew of the rules nor that they were made for his benefit. *Porter v. New York, New Haven, & Hartford Railroad*, 271.

In an action against a street railway company for the conscious suffering and death of the plaintiff's intestate alleged to have been caused by an assault committed upon him by a conductor after he had refused to comply with a regulation of the defendant prohibiting passengers from riding in a vestibule of a car, evidence tending to show a custom of the defendant to permit passengers to ride in vestibules was excluded rightly. *Liversidge v. Berkshire Street Railway*, 234.

Exception to the exclusion of evidence offered for a certain purpose will not be sustained on the ground that the evidence might have been admitted for another purpose. *Worcester Board of Health v. Tupper*, 878.

In a prosecution for a violation of R. L. c. 56, §§ 57, 58, with regard to the sale of milk, evidence is not admissible to show that the defendant did not intend to violate the statute. *Commonwealth v. Phelps*, 109.

Remoteness.

A period of about twenty-three months, which a judge in his discretion ruled might be covered by an examination in regard to the plaintiff's employment in an action for damages resulting from unlawful interference therewith by the defendant, was held not to have been so unreasonably extended that the ruling should be revised. *Lopes v. Connolly*, 487.

Evidence, offered at the trial of an action for injuries caused by the unsafe condition of the approaches to a store, which tended to show the condition of the approaches six months after the injuries were received, was rightly admitted by the judge in the exercise of his discretion after evidence had been introduced tending to show that the condition of the approaches had remained unchanged since the accident. *Ferron v. King*, 75.

Extrinsic affecting Writings.

Evidence tending to vary the terms of an order in writing containing no ambiguity and not procured by fraud was held to be inadmissible. *Puffer Manuf. Co. v. Krum*, 211.

In an action upon an unequivocal agreement in writing to pay for volumes of an existing publication, where the agreement contained a statement that it was unconditional, the defendant was held not to be entitled to introduce evidence of an agreement by the agent which tended to vary the contract and was not sufficient to support a defense of fraud. *Friedman v. Pierce*, 419.

Extrinsic affecting Statute.

The rule of law, which under proper conditions allows the admission of extrinsic evidence to explain the technical or peculiar meaning of a word as used in an instrument in writing, never has been applied to the interpretation of the language of a statute. *Selectmen of Natick v. Boston & Albany Railroad*, 229.

Extrinsic affecting Officer's Return.

Extrinsic evidence is not admissible to contradict or control the return upon an execution of an officer who was authorized to act under the execution. *Blake v. Rogers*, 588.

Admissions and Confessions.

It was held not to be within the scope of the authority of an agent, who had authority to deliver and to receive documents with regard to the installation of a soda fountain, to bind his employer by admissions as to the fountain's imperfections. *Puffer Manuf. Co. v. Krum*, 211.

Evidence of a statement by one, who might have been found to have been a superintendent for one who was the defendant in an action of tort, was held to be inadmissible at the trial of the action because the statement did not appear to have been made within the scope of the superintendent's employment. *Murphy v. Fred T. Ley & Co., Inc.*, 371.

In an action of deceit by an insurance company against one who was alleged to have procured fraudulently from the plaintiff payment of a loss alleged to have been sustained under a policy of fire insurance, the plaintiff, to impeach testimony of the defendant and of her husband, rightly was permitted to introduce evidence of statements in the nature of admissions made to a deputy chief of the district police upon an official inquiry to investigate the fire. *Palatine Ins. Co. v. Kehoe*, 426.

Evidence (continued).

A statement of a witness called by a plaintiff which is contrary to other evidence of the plaintiff is not to be treated as an admission by the plaintiff. *Farris v. Boston Elevated Railway*, 585.

Opinion: Experts.

It is for the judge who presides at the trial of an action where a question of the law of another state is in issue to decide whether a witness offered as an expert on such law is qualified as such. *Greene v. Corey*, 536.

Discretionary power of a judge presiding at the trial of a criminal complaint in determining as to the qualification of a witness offered as an expert. *Commonwealth v. Phelps*, 109.

Evidence offered to show that a witness, who had testified for the plaintiff in an action against a street railway company for injuries received in a collision, at the time of the accident had expressed the opinion that the collision was no fault of the defendant, properly was excluded. *Smith v. Holyoke Street Railway*, 202.

Declarations of Deceased Persons.

Before a declaration made by a person afterwards deceased can be admitted as evidence under R. L. c. 175, § 68, the presiding judge must find that the declaration was made in good faith, before the commencement of the action and upon the personal knowledge of the declarant, and the burden of establishing such facts is upon the party offering the evidence. *Carroll v. Boston Elevated Railway*, 500.

Declaration of Agent.

Evidence of a statement by one who might have been found to have been a superintendent for one who was the defendant in an action of tort was held to be inadmissible at the trial of the action because the statement did not appear to have been made within the scope of the superintendent's employment. *Murphy v. Fred T. Ley & Co., Inc.*, 371.

Officer's Return upon Execution.

The fact that the requirements of R. L. c. 178, § 28, were observed at a sale of real estate on an execution may be proved by the execution with the return thereon of the officer who made the sale, if such return in substance and with certainty shows compliance with the statutory requirements although it contains verbal departures from the wording of the statute. *Blake v. Rogers*, 588.

Officer's return which was sufficient for such purposes. *Ibid.*

Extrinsic evidence is not admissible to contradict or control the return upon an execution of an officer who was authorized to act under the execution. *Ibid.*

Of Custom or Usage.

See CUSTOM; USAGE.

Of Fraud.

Evidence which was held not to be sufficient to show fraud in the procuring of a contract in writing to pay for certain volumes of an existing publication. *Friedman v. Pierce*, 419.

In an action on a promissory note, evidence tending to show that the plaintiff was induced to sign a release by a promise of the defendant, that, notwithstanding the release, when his sister should die he would pay the note held by the plaintiff, and that at the time when the defendant made this promise he did not intend to keep it, is admissible to show that the release was obtained by fraud. *Comstock v. Livingston*, 581.

In an action by an executor on a promissory note, where the only defense is a release under seal given by the plaintiff's testatrix to the defendant, and the plaintiff contends and offers to show that the release was procured by fraud, statements of the testatrix referring to the release were held to be admissible as bearing upon the influence exerted upon the mind of the plaintiff's testatrix by what the defendant said. *Ibid.*

Other cases in which certain evidence which was held to be admissible and sufficient to warrant findings that certain releases were procured by fraud. *Kean v. New York Central & Hudson River Railroad*, 449; *Greene v. Corey*, 536.

Of Fraudulent Intention.

In an action upon a promissory note, evidence tending to show that the plaintiff was induced to sign a release by a promise of the defendant, that, notwithstanding the release, when his sister should die he would pay the note held by the plaintiff, and that at the time when the defendant made this promise he did not intend to keep it, is admissible to show that the release was obtained by fraud. *Comstock v. Livingston*, 581.

Of State of Mind.

Evidence which was held properly to have been admitted, at the trial of an action against a corporation by its president to recover the value of special services rendered, to show the state of mind of the members of the board of directors of the corporation as to whether they understood that the services were to be paid for or were rendered in the plaintiff's capacity as an officer of the defendant. *Marcy v. Shelburne Falls & Colrain Street Railway*, 197.

Of Fiduciary Relation.

In an action by an executor upon a promissory note, where the only defense was a release under seal given by the plaintiff's testatrix to the defendant and the plaintiff contended and offered to show that the release was procured by fraud on the part of the defendant, a ruling of the presiding judge, that there was no evidence that the defendant was a trusted and confidential adviser of the plaintiff's testatrix, was held to have been correct. *Comstock v. Livingston*, 581.

Evidence (*continued*).

Of Conversation in Foreign Language.

In this Commonwealth a witness in a criminal case may be allowed to state in English the substance of a conversation which he had with the defendant in a foreign language. *Commonwealth v. Shooshanian*, 123.

Proof of Identity of Party to Action.

Facts in evidence in an action against a corporation for injuries caused by the plaintiff's horse being thrown down by wires stretched across a highway, which were held to warrant an inference that the defendant and the corporation which was responsible for the wires being so strung were identical. *Murphy v. Fred T. Ley & Co., Inc.*, 371.

Of Meaning of Deed.

Effect of acts of parties to a deed, continued for eight years, in showing the true interpretation of a deed. *Randall v. Grant*, 302.

Of Meaning of Statute.

The rule of law, which under proper conditions allows the admission of extrinsic evidence to explain the technical or peculiar meaning of a word as used in an instrument in writing, never has been applied to the interpretation of the language of a statute. *Selectmen of Natick v. Boston & Albany Railroad*, 229.

Where the language of a statute is of doubtful import, a construction put upon it for many years, during which the statute was not amended, by officers charged under its provisions with the performance of public duties, is strong evidence of its meaning. *Burrage v. County of Bristol*, 299.

By Deposition.

Interrogatories and cross interrogatories and answers thereto in a deposition taken in another State, which were held to be material in an action against a stockholder by a customer for breach of contracts to buy and sell on margin. *Greene v. Corey*, 536.

Offer of Proof.

Where at the trial of a criminal case the defendant makes an offer of proof containing various matters which are clearly too remote to be admissible, the presiding judge properly may exclude the evidence thus offered as a whole, without separating it into parts and passing upon the admissibility of each part separately. *Commonwealth v. Shooshanian*, 123.

Statement by Witness before Trial.

Statement in writing made by a witness for the defendant in an action for personal injuries, to the defendant before the trial, improperly was admitted in evidence in redirect examination of the witness after the plaintiff had inquired regarding it in cross-examination. *Flaherty v. Boston & Northern Street Railway*, 321.

Res inter Alios.

Report of the detective department of the district police was held inadmissible in an action against a railroad corporation by one whose goods had been injured by fire while they were in the possession of the defendant as a carrier. *P. Garvan, Inc., v. New York Central & Hudson River Railroad*, 275.

EXECUTION.

Levy.

A deputy sheriff who is in possession of property under attachment upon writs in different actions against the same defendant is the officer who must receive and levy upon the property all executions which may issue in the actions, and he may refuse to deliver the property to another officer who demands it by virtue of an execution in one of the actions. *Beaulieu v. Clark*, 90.

Officer's Return upon.

Extrinsic evidence is not admissible to contradict or control the return upon an execution of an officer who was authorized to act under the execution. *Blake v. Rogers*, 588.

Execution Sale.

The meaning of the requirement of R. L. c. 178, § 28, as to the publication of the notice of the time and place of an execution sale of real estate is that such publication shall be in a newspaper printed and issued within the county; and therefore a return of the officer making such a sale, that he "published" notice thereof in a newspaper "printed" in the county, sufficiently shows compliance with the above requirement of the statute. *Blake v. Rogers*, 588.

The fact that the requirements of R. L. c. 178, § 28, were observed at a sale of real estate on an execution may be proved by the execution with the return thereon of the officer who made the sale, if such return in substance and with certainty shows compliance with the statutory requirements although it contains verbal departures from the wording of the statute. *Ibid.*

Officer's return which was sufficient for such purpose. *Ibid.*

EXECUTOR AND ADMINISTRATOR.

Action at law cannot be maintained by the next of kin of an intestate against an attorney employed by the administrator, to recover damages for alleged wrongful acts of the defendant while acting as such attorney. *Norton v. Lilley*, 214.

The administrator of an estate which has been declared insolvent is the proper person to sue for the amount of a policy of life insurance upon the life of the decedent which the insured before his death had transferred in fraud of his creditors, and also under St. 1907, c. 576, § 78, for premiums paid by the insured in fraud of his creditors upon a policy which he had transferred to his wife. *York v. Flaherty*, 85.

FALSE IMPRISONMENT.

Passenger, who was arrested unlawfully upon a railroad train and was taken from the train through the streets of a town by employees of the railroad corporation because he refused to comply with a reasonable rule or regulation of the corporation operating the railroad, was allowed to recover from the corporation as for a trespass *ab initio*. *Hull v. Boston & Maine Railroad*, 159.

FALSE AND FRAUDULENT REPRESENTATIONS.

Testimony of the plaintiff at the trial of an action by a customer against a stockbroker for breach of contracts to purchase and sell securities upon margin for the plaintiff, which was held to have been material on the question whether certain releases relied on by the defendant were procured from the plaintiff by fraud. *Greene v. Corey*, 586.

Evidence which was held to be sufficient to show that the releases were so procured. *Ibid*.

In an action on a promissory note evidence tending to show that the plaintiff was induced to sign a release by a promise of the defendant, that when his sister should die he would pay the note held by the plaintiff notwithstanding the release, and that at the time when the defendant made this promise he did not intend to keep it, is admissible to show that the release was obtained by fraud. *Comstock v. Livingston*, 581.

Statement of the rule for the assessment of damages in an action of tort for damages alleged to have been caused by false and fraudulent representations of the defendant in the sale of live stock and a milk route and the negotiating of a lease of a dairy farm to the defendant, and proper comments by the judge to the effect that difficulty in ascertaining with exactness the extent of the damages should not lead the jury to exempt the defendant from any consequences of his fraud. *Thomson v. Pentecost*, 228.

Actions for false and fraudulent representations, see DECEIT.

FENCE.

A railroad corporation is under no obligation either at common law or by statute to erect or maintain a fence or barrier between its freight yard and a bordering public way. *Khinoveck v. Boston & Maine Railroad*, 170.

Proper decree of fence viewers under R. L. c. 33, § 6, and an action, which was based thereon, for double the value of a part of a partition fence. *Leonard v. Lyon*, 248.

FENCE VIEWERS.

Recital, in a decree of fence viewers under R. L. c. 33, § 6, that due notice had been given to the adverse party of hearings for assessing the value of a part of a partition fence, is evidence that such notice was given. *Leonard v. Lyon*, 248.

Proper decree of fence viewers under R. L. c. 33, § 6, and an action, which was based thereon, for double the value of a part of a partition fence. *Ibid*.

FIRE.

Liability of railroad corporation for damage to property due to sparks escaping from its locomotive engines. *New England Box Co. v. New York Central & Hudson River Railroad*, 465.

Insurance against loss by fire, see INSURANCE, Fire.

FIXTURES.

A china closet and a water heater were held under the circumstances to belong to the tenant who had placed them on certain leased premises and to be removable by him at the termination of his lease. *Houle v. Abramson*, 83.

FOOD.

A sale of "blended maple sugar," which is a well known article in the trade in which the parties to the sale are engaged, consisting in part of maple sugar and in part of granulated sugar and having been ordered as such mixture, is not a sale of adulterated food or of an imitation within the meaning of R. L. c. 75, §§ 16-18. *Adams v. New England Maple Syrup Co.* 475.

Sale of such sugar in unmarked packages which was valid. *Ibid.*

FRAUD.

Evidence which was held not to be sufficient to show fraud in the procuring of a contract in writing to pay for certain volumes of an existing publication. *Friedman v. Pierce*, 419.

Testimony of the plaintiff at the trial of an action by a customer against a stockbroker for breach of contracts to purchase and sell securities upon margin for the plaintiff, which was held to have been material on the question whether certain releases relied on by the defendant were procured from the plaintiff by fraud. *Greene v. Corey*, 536.

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In an action by an executor on a promissory note, where the only defense was a release under seal given by the plaintiff's testatrix to the defendant and the plaintiff contended and offered to show that the release was procured from his testatrix by fraud on the part of the defendant, a ruling of the presiding judge, that there was no evidence that the defendant was a trusted and confidential adviser of the plaintiff's testatrix was held to have been correct. *Ibid.*

In such an action statements of the testatrix, referring to the release, were

Fraud (continued).

held to be admissible as evidence bearing upon the influence exerted upon the mind of the plaintiff's testatrix by what the defendant said. *Comstock v. Livingston*, 581.

Because the plaintiff in such an action can prove that the release was obtained by fraud without filing a replication to that effect, a judge of the Superior Court has power to strike such a replication from the records. *Ibid*.

In an action of tort by an employee of a sleeping car company against a railroad company for personal injuries where the defendant contended that the plaintiff had made a contract in writing with his employer, the effect of which was to release the defendant from liability, certain evidence was held to be sufficient to entitle the plaintiff to go to the jury on the question, whether his signature thereto was procured by false and fraudulent representations so that the contract was not binding upon him. *Kean v. New York Central & Hudson River Railroad*, 449.

Suit by a wife to have set aside deeds procured by her husband through fraud and duress, conveying property from her to her daughter and from her daughter to him. *Hoag v. Hoag*, 94.

Master's findings on unreported evidence in a suit of a man and his wife of advanced years to set aside a deed for fraud were held not to be clearly wrong. *Crosier v. Kellogg*, 181.

Woman whose husband in fraud of his creditors transferred to her a policy of life insurance may retain the proceeds of the policy after his death under St. 1907, c. 576, § 78, although he had induced creditors to make advances to him by oral representations that he had insurance which in case of his death would be available to satisfy their claims. *York v. Flaherty*, 35.

Time, when the right accrues to begin a suit for the recovery, under R. L. c. 118, § 78, now St. 1907, c. 576, § 8, of amounts of premiums paid by the insured in fraud of his creditors on a policy of life insurance, and when the period of the statute of limitations begins, is the date of the death of the insured. *Ibid*.

Various other rulings in a suit in equity brought against the widow and son of one who in fraud of his creditors had paid premiums upon certain policies of life insurance and had transferred the policies, partly to his wife and partly to his son. *Ibid*.

Action to recover damages for a false and fraudulent representation of the defendant whereby the plaintiff was alleged to have been induced to buy a share in a provision business carried on by the defendant and another, in which it was held that the question, whether the defendant's representation or other considerations induced the plaintiff to purchase, upon the conflicting evidence properly was left to the jury. *Townsend v. Niles*, 245.

Statement of the rule for the assessment of damages in an action of tort for damages alleged to have been caused by false and fraudulent representations of the defendant in the sale of live stock and a milk route and the making of a lease of a dairy farm to the plaintiff, and proper comments by the judge to the effect that difficulty in ascertaining with exactness the extent of the damages should not lead the jury to exempt the

defendant from any consequences of his fraud. *Thomson v. Pentecost*, 228.

Debt of a bankrupt for a misappropriation of funds while acting in a fiduciary capacity, which did not lose its fiduciary character because of certain acts of the bankrupt or by being reduced to judgment, and was not barred by his discharge in bankruptcy. *Brown v. Hannagan*, 246.

FRAUDS, STATUTE OF.

In an action against one alleged to be the owner of certain real estate for personal injuries due to a defective condition of the land at its junction with a public sidewalk, it was held that, if the title to the real estate was in another under an oral agreement for the defendant's benefit, there could be no recovery unless the defendant was in occupation of the land or had undertaken its management and control. *Curry v. Dorr*, 430.

Memorandum which was held to have stated with sufficient certainty to satisfy the statute of frauds the boundaries of a lot of land. *Desmarais v. Taft*, 560.

In a suit in equity by a member of a partnership, to enforce an oral agreement for the conveyance to the partners of certain real estate which had been conveyed to one of the defendants without consideration by the mother of the partners, facts, which showed that the partners had been induced to make expenditures upon the land and to change their situation materially in reliance upon the performance of the oral agreement, were held to preclude the defendants from setting up the statute of frauds. *Davis v. Downer*, 573.

The statute of frauds was held not to prevent the giving of relief in a suit in equity to compel the completion, by a formal conveyance of land, of an imperfect execution of a power under a will. *Coates v. Lunt*, 814.

Statute of frauds was held not to be a defense to an action for breach of a contract in writing as modified by a proposition in writing by the defendant to which the plaintiff had assented orally. *John Hetherington & Sons, Ltd., v. William Firth Co.* 8.

GAS COMPANY.

Evidence, in an action by a gas company for rent of a gas meter, which was held to warrant a finding that gas had been received by the defendant from the plaintiff in accordance with a written notice from the plaintiff that a meter charge would be made, and that R. L. c. 58, § 12, did not prevent the company from collecting the charge. *Amesbury & Salisbury Gas Co. v. Gibney*, 498.

GOVERNOR AND COUNCIL.

As to pardon or commutation of sentence by concurrent action by the Governor and Council, see *Opinion of the Justices*, 609.

GRADE CROSSING.

Municipality was held bound to keep in repair the under floor of a bridge built over a railroad under an order in proceedings for the abolition of a grade crossing. *Selectmen of Natick v. Boston & Albany Railroad*, 229.

Action for death of a person killed at a grade crossing of a railroad with a highway. *Rodrigues v. New York, New Haven, & Hartford Railroad*, 305.

GREYLOCK STATE RESERVATION.

Rulings and instructions and a striking out of evidence by the judge presiding at the trial of a petition to recover compensation for a large tract of land on Greylock Mountain taken under St. 1898, c. 543, for the Greylock State Reservation, which were held not to have been prejudicial to the petitioner. *Smith v. Commonwealth*, 259.

GUARANTY.

Application of the rule, that in the absence of any proof to the contrary the parties to a promissory note are liable on it according to the legal effect of the instrument, in a case where the guarantor of a note contended that she was liable for only half the amount of the note because of an agreement between her and the payee which there was no evidence to prove. *Enterprise Brewing Co. v. Canning*, 285.

GUARDIAN.

Certain acts of a guardian committed for the purpose of avoiding an increase of taxation of the estate, no loss to the ward's estate resulting, although they were stated to be a breach of duty owed by the guardian to the public and as such were to be condemned, were held to furnish no reason for denying to the guardian such compensation as he may have earned for his other services to the estate of the ward. *Harding v. Forbush*, 460.

A guardian was held not to be entitled to set up at hearings on his accounts, as an adjudication of the propriety of certain overpayments made by him to a caretaker of his ward, a judgment for the caretaker entered by consent in a certain action brought by the caretaker against the ward in her lifetime and continued against the administrator of her estate after her death. *Ibid.*

An overpayment by a guardian to a caretaker of his ward, which was made in good faith under the circumstances of this case, was held not to warrant charging the guardian in his accounts with compound interest on the sum so overpaid. *Ibid.*

HABEAS CORPUS.

The writ of *habeas corpus* will not be issued to take the place of an appeal, a bill of exceptions or a writ of error in a criminal case where the defendant has been tried by a court having jurisdiction of the crime with which he

was charged and where the only question raised is in regard to the correctness of the rulings made at the trial in that court. *Flito's case*, 33.

Nor is such a proceeding the proper one to bring before this court the propriety of issuing a warrant upon a complaint without an examination of the complainant and his witnesses under oath as prescribed by R. L. c. 217, § 22. *Ibid*.

HIGHWAY.

See *WAY, Public*.

HOMICIDE.

St. 1910, c. 555, § 3, repealing the provision of R. L. c. 157, § 8, which required capital cases to be tried before more than one judge of the Superior Court, is not unconstitutional. *Commonwealth v. Phelps*, 78.

HUSBAND AND WIFE.

Woman, whose husband in fraud of his creditors transferred to her a policy of life insurance, may retain the proceeds of the policy after his death under St. 1907, c. 576, § 73, although he had induced his creditors to make advances to him by oral representations that he had insurance which in case of his death would be available to satisfy their claims. *York v. Flaherty*, 35.

Various rulings in a suit against a wife under St. 1907, c. 356, § 3, by the administrator of the estate of a husband, who in fraud of his creditors had made payments of premiums on policies of life insurance which he had transferred to his wife. *Ibid*.

Suit by a wife to have set aside deeds procured by her husband through fraud and duress conveying property of hers to her daughter and from her daughter to him. *Hoag v. Hoag*, 94.

Condonation in its proper legal sense has reference to marital rights and liabilities as such and to none other. *Ibid*.

A decree, dismissing a petition by a wife for separate maintenance because of condonation by the wife of cruelty on the part of the husband which she had alleged as the ground for her petition, is not conclusive proof of ratification by her of a deed which she had given under duress by him and for his benefit at the time of the acts of cruelty alleged in the petition, and does not bar a suit in equity by her to have the deed set aside. *Ibid*.

ICE AND SNOW.

See *SNOW AND ICE*.

INSURANCE.

Life.

Woman, whose husband in fraud of his creditors transferred to her a policy of life insurance, may retain the proceeds of the policy after his death under St. 1907, c. 576, § 73, although he had induced creditors to make advances

Insurance (continued).

to him by oral representations that he had insurance which in case of his death would be available to satisfy their claims. *York v. Flaherty*, 85.
The administrator of an estate which has been declared insolvent is the proper person to sue for the amount of a policy of life insurance upon the life of the decedent which before his death he had transferred in fraud of his creditors, and also under St. 1907, c. 576, § 78, for premiums paid by the insured in fraud of his creditors upon a policy which he had transferred to his wife. *Ibid.*

In such a suit against the widow of the insured, she cannot successfully contend that a loan, made by the insurance company to the insured, to secure the payment of which the insurance company had taken a note signed by the insured and the defendant and an assignment of the policy, was in effect a debt owed to her by the estate which she might set off against the claim for the premiums fraudulently paid. *Ibid.*

In such a suit premiums which were paid before the policy was transferred by the insured to his wife cannot be recovered if it does not appear that when the insured paid the premiums he intended to make the transfer. *Ibid.*

Time, when the right accrues to begin a suit for the recovery, under R. L. c. 118, § 78, now St. 1907, c. 576, § 78, of amounts of premiums paid by the insured in fraud of his creditors on a policy of life insurance, and when the period of the statute of limitations begins to run, is the date of the death of the insured. *Ibid.*

A charge of interest against an insurance company which was holding the amount of the proceeds of an insurance policy pending the adjustment of a suit between the administrator of the estate of the insured and the insured's widow and son and the company, was held to be proper. *Ibid.*

A request in writing, made of an insurance company by a holder of a life insurance policy and assented to in writing by the company, was held to be a valid transfer of part of the proceeds of the policy to the wife of the insured and part to his son, although neither the wife nor the son knew of it; and, if made in fraud of the insured's creditors, to be valid under St. 1907, c. 576, § 78, as to the part given to the wife and invalid as to that given to the son. *Ibid.*

Fire.

Where the owner of a certain building insured it after he had given a bond for a deed thereof and the obligee of the bond assigned it to one, who paid to the owner the balance due upon the bond but took no conveyance of the property, and the property then was destroyed by fire, the owner was held to have had an insurable interest in the property at the time of the fire to the extent of its full value. *Adams v. North American Ins. Co.* 550.

An insurance company may maintain an action for deceit to recover an amount paid to the defendant on an alleged loss of property by fire under a policy issued by it, on showing that it was induced to make the payment by misrepresentations of material facts concerning the property knowingly

made by the defendant in the proof of loss signed and sworn to by him with the intention that they should be acted upon by the plaintiff. *Palatine Ins. Co. v. Kehoe*, 426.

"Rider" which had been issued by the plaintiff in such an action but never had been attached to the policy, properly was admitted in evidence without the policy, which had been destroyed by fire. *Ibid.*

By St. 1895, c. 293, insurance companies, which have paid losses on property caused by fires communicated by the locomotive engines of a railroad corporation, have no right of subrogation to the remedy of the insured against the railroad corporation under the statute creating liability of a railroad corporation for such fires. *New England Box Co. v. New York Central & Hudson River Railroad*, 465.

INTEREST.

An overpayment by a guardian to a caretaker of his ward, which was made in good faith under the circumstances of this case, was held not to warrant charging the guardian in his accounts with compound interest on the sum so overpaid. *Harding v. Forbush*, 460.

A charge of interest against an insurance company which was holding the amount of the proceeds of an insurance policy pending the adjustment of a suit between the administrator of the estate of the insured and the insured's widow and son and the company, was held to be proper. *York v. Flaherty*, 85.

INTERROGATORIES.

Interrogatories and cross-interrogatories and answers thereto in a deposition which were held to be material evidence, see *Greene v. Corey*, 536.

JUDGMENT.

Whether in an action against a non-resident, who, by appearing specially by a receiver of his property appointed under R. L. c. 144 and answering in bar instead of in abatement, had waived a defense that the notice required by R. L. c. 170, § 5, had not been given, judgment should be general or special and only against property attached in the action, see *Johnson v. Carr*, 1.

Where upon the sustaining of a demurrer in the Superior Court, the plaintiff alleges an exception, no judgment should be directed to be entered until the exception is overruled unless the exception is adjudged to be immaterial, frivolous or intended for delay. *Norton v. Lilley*, 214.

A judgment of dismissal entered in due course in an action in the Superior Court, which was called and dismissed pursuant to a general order of that court to that effect applying to all cases in which no action has been taken within the year next preceding, is a final judgment within the meaning of R. L. c. 193, § 15, which requires that a petition to vacate a final judgment shall be filed within one year after the entry of such judgment. *Karrick v. Wetmore*, 578.

Judgment (continued).

Where, in an action which was dismissed under a general order of the Superior Court because nothing had been done within a year, it is shown by the records of that court that there had been proceedings in the action within the year next preceding the judgment of dismissal but it does not appear that there had been any clerical error in the entry of that judgment, this does not give the Superior Court jurisdiction to grant a motion to vacate a judgment where the motion was filed more than one year after the judgment was entered. *Karrick v. Wetmore*, 578.

Decrees of the Probate Court confirming certain accounts of trustees in which certain items were treated as capital were held to bar a contention, by one who had succeeded to the interest of certain beneficiaries who had assented to the accounts, that the items should have been treated as income. *Southard v. Southard*, 847.

A guardian was held not to be entitled to set up at hearings upon the allowance of his accounts, as an adjudication of the propriety of certain overpayments made by him to a caretaker of his ward, a judgment for the caretaker entered by consent in a certain action brought by the caretaker against the ward in her lifetime and continued against the administrator of her estate after her death. *Harding v. Forbush*, 460.

Reducing to judgment a claim founded on fraud of the defendant while acting in a fiduciary capacity, which was held not to cause the claim to be barred by a discharge in bankruptcy of the defendant. *Brown v. Hannagan*, 246.

JURISDICTION.

See POLICE, DISTRICT AND MUNICIPAL COURTS; SUPERIOR COURT;
EQUITY JURISDICTION.

LABOR.

Employment of Women and Children.

Constitutionality of St. 1909, c. 514, § 48, limiting the time during which women and children may be employed in manufacturing and mechanical establishments. *Commonwealth v. Riley*, 387.

The requirement of St. 1909, c. 514, § 48, as to the posting of notices regarding the hours of labor of women and children in manufacturing and mechanical establishments is for such notice only as to women and children regularly employed in labor practically permanent. *Ibid.*

The means provided for the enforcement of St. 1909, c. 514, § 48, are not unreasonable, unnecessary or arbitrary, and are within the powers of the Legislature. *Ibid.*

Complaint for violation of such provisions which was held to be sufficient. *Ibid.*

Evidence which was held sufficient to warrant a finding that a superintendent in a factory was guilty of violation of such provisions. *Ibid.*

Strikes.

Lawful strike undertaken by lasters in a shoe factory in good faith to prevent the proprietor of the factory from permitting a laster in his employ

to employ and pay a helper for whose work the laster was paid by the proprietor in addition to being paid for his own work. *Minasian v. Osborne*, 250.

LACHES.

See that subtitle under EQUITY JURISDICTION.

LAND COURT.

Exceptions.

On exceptions to a decision of a judge of the Land Court it was held that findings of fact by the trial judge were conclusive and that this court could not consider whether they were supported by the weight of the evidence or whether a different inference could have been drawn from the facts. *Gorton-Pew Fisheries Co. v. Tolman*, 402.

Appeal.

A report of a decision of a judge of the Land Court, filed by him in the Superior Court on an appeal from his decision while St. 1905, c. 288, was in force, has no value as evidence if it contains only a ruling of law. *Blake v. Rogers*, 588.

LANDLORD AND TENANT.

Tenancy at Will.

In an action by a landlord against a tenant at will for rent, if the defendant relies upon an alleged waiver by the plaintiff of the requirement of a notice under R. L. c. 129, § 12, the burden of proving such a waiver is on the defendant. *Leavitt v. Maykel*, 55.

Facts which were held not to amount to such a waiver as matter of law. *Ibid.*

Transactions between landlord and tenant where both parties proceeded on mistaken ideas of their rights but where the circumstances were held not to preclude the landlord from recovering from the tenant as a tenant at will. *Ibid.*

Fixtures.

A china closet and a water heater were held under the circumstances to belong to the tenant who had placed them on the leased premises and to be removable by him at the termination of the lease. *Houle v. Abramson*, 88.

Landlord's Duty to Tenant and his Family.

Action against a landlord for injuries caused to the wife of a tenant by a defective condition of a temporary step provided by the landlord and used in common by several tenants. *Ward v. Blouin*, 140.

Action by a girl against the landlord of a tenement in which she lived with her father, for personal injuries caused by a defect in a plank walk at the side of a passageway leading from the tenement to a highway, in which the questions of the plaintiff's due care and of the defendant's negligence were held to be for the jury. *Callahan v. Dickson*, 510.

LARCENY.

Under the provisions of St. 1909, c. 442, giving to the police, district and municipal courts jurisdiction of the crime of larceny of property not exceeding \$300 in value and empowering them to impose the same penalties as the Superior Court in like cases except imprisonment in the State prison, a complaint in such a court for such an offense is not open to the objection that it charges a felony. *Commonwealth v. Drohan*, 445.

Various rulings as to the jurisdiction of a municipal court of a certain complaint for attempting to commit larceny from the person and the effect upon various motions by the defendant of a default by him in the Superior Court upon an appeal from a sentence imposed in the Municipal Court. *Ibid.*

Circumstantial evidence which was held to be sufficient to sustain the burden of proof resting on the Commonwealth at the trial of an indictment for breaking and entering and larceny. *Commonwealth v. Taylor*, 443.

LEGACY.

See DEVISE AND LEGACY.

LETTERS.

Review by RUGG, C. J., of the authorities relating to the protection by courts of equity of the right of the author of an ordinary private letter, which is without value as literature, to restrain its publication. *Baker v. Libbie*, 599.

The executor of the will of the author of friendly letters, which do not possess qualities of literature and were written to a cousin about domestic and business affairs, referring to household matters, to health and to the work which the writer was doing, may maintain a suit in equity, to restrain the publication of such letters or their multiplication in any way in whole or in part, and to compel the holder of the letters to allow the plaintiff to make copies of them within a reasonable time; but he is not entitled to a decree restraining the sale and transfer of such letters as manuscripts. *Ibid.*

LIMITATIONS, STATUTE OF.

As to when the statute of limitations is effectual to bar a suit in equity by the trustee of an estate against the trustee of another estate to obtain relief from fraudulent acts of a person who formerly was a trustee of both estates. *Bremer v. Williams*, 256.

Time, when the right accrues to begin a suit for the recovery, under R. L. c. 118, § 73, now St. 1907, c. 576, § 73, of amounts of premiums paid by the insured in fraud of his creditors on a policy of life insurance, and when the period of the statute of limitations begins, is the date of the death of the insured. *York v. Flaherty*, 35.

LORD'S DAY.

Defense, that a contract is invalid because it was made on the Lord's day must be pleaded specifically in order to be relied on. *Silver v. Graves*, 26.
Fact that a certain conversation resulting in a certain contract was held on the Lord's day did not affect the validity of contract. *Ibid*.

MALICIOUS PROSECUTION.

Evidence which warranted a finding for the plaintiff in an action by a boy for malicious prosecution in causing the arrest of the plaintiff upon a charge of larceny of a horse. *Griffin v. Dearborn*, 308.
At the trial of an action for malicious prosecution it is error for the presiding judge to instruct the jury that if they find that the defendant instituted the prosecution of the plaintiff from malice they should return a verdict for the plaintiff, without also plainly instructing them that the plaintiff cannot recover unless the absence of probable cause for the prosecution also is shown. *Ibid*.

MARRIAGE AND DIVORCE.

Condonation in its proper legal sense has reference to marital rights and liabilities as such and to none other. *Hoag v. Hoag*, 94.
Facts in evidence at the hearing of a libel for divorce on the ground of desertion were held to warrant a finding made by the judge that the libellant had resumed marriage relations with the libellee within three years, so that the libel should be dismissed. *La Flamme v. La Flamme*, 156.
Finding of a trial judge, which was warranted by the evidence, that the court did not have jurisdiction of a libel for divorce because the libellant had not resided in the Commonwealth for five consecutive years. *Labonte v. Labonte*, 819.

MARRIED WOMEN.

See HUSBAND AND WIFE.

MASTER AND SERVANT.

See AGENCY; NEGLIGENCE, *Employer's Liability*.

MECHANIC'S LIEN.

Respondent in a petition to enforce a mechanic's lien, who claims as a credit the amount of a promissory note given by him to the petitioner but never paid, has the burden of proving that the note was given and taken as payment. *Cary Brick Co. v. Wheeler*, 338.

MEMORANDA.

Resignation of Chief Justice Knowlton, 82.
Appointment of Chief Justice Rugg, 82.
Appointment of Mr. Justice DeCourcy, 82.

MESSENGER SERVICE.

If a corporation engaged in the business of furnishing upon application messengers for the delivery of parcels receives a parcel from a customer as a bailee and not under such circumstances that any of its servants or agents becomes a servant or agent of the customer, and if the parcel is misdelivered by its employee, this constitutes a conversion for which the corporation is liable. *Murray v. Postal Telegraph-Cable Co.* 188.

Action against a corporation, engaged in the business of furnishing messengers to carry parcels, to recover for the loss of a parcel because of the negligence of one to whom it was transferred for delivery, in which it was held that the employee of the defendant who lost the parcel under the circumstances was not an agent of the plaintiff, and that the case was distinguishable from *Haskell v. Boston District Messenger Co.* 190 Mass. 189. *Ibid.*

Instructions in such action to the effect that it was common knowledge that such a corporation did not undertake to deliver parcels of great value, and that, if the plaintiff delivered such a parcel to the defendant's servant without disclosing its value, he was not in the exercise of due care and could not recover, were held to be erroneous. *Ibid.*

MILK.

In a prosecution for a violation of R. L. c. 56, §§ 57, 58, with regard to the sale of milk, evidence is not admissible to show that the defendant did not intend to violate the statute. *Commonwealth v. Phelps*, 109.

Certain documents which were held not to be competent evidence to contradict witnesses who had testified for the Commonwealth in a prosecution for violation of R. L. c. 56, §§ 57, 58, regulating the sale of milk. *Ibid.*

MISTAKE.

Suit in equity seeking relief from a deed to a city on the ground of accident or mistake of the plaintiff with regard to certain conduct of the city's officers. *Oesting v. New Bedford*, 396.

MORTGAGE.

Of Real Estate.

Where the owner of certain land which was subject to a second mortgage gave to a street railway company permission to erect poles on the land and to string wires across it, the second mortgagee, after he has acquired title to the land by foreclosure of his mortgage and has made a demand of the company that it remove its poles and wires and after the company has refused to comply with the demand, may maintain against the company an action of tort in the nature of trespass *quare clausum fregit*. *Phelps v. Berkshire Street Railway*, 49.

In such an action, the character of the defendant's structures and of its acts

in sending a dangerous current of electricity over the plaintiff's land are proper matters for consideration by the jury in the assessment of damages. *Phelps v. Berkshire Street Railway*, 49.

MUNICIPAL CORPORATIONS.

Officers and Agents.

Wages of a dog officer are to be paid by the day during the term of his actual employment. *O'Neill v. County of Worcester*, 374.

Under R. L. c. 102, § 143, a bill for services as a dog officer in a city must be approved by the mayor of the city as a condition precedent to payment by the county treasurer; and an approval of such a bill by the person who was the mayor of the city when the services were rendered, given after he had ceased to be mayor, is of no effect. *Ibid.*

The city, and not the members of its board of health, is the proper party plaintiff in a suit under R. L. c. 102, § 71, to restrain the unlicensed erection, occupation or use of a building for a stable in a city whose population exceeds twenty-five thousand. *Worcester Board of Health v. Tupper*, 378.

Suit in equity against a city by one who had conveyed land with buildings thereon to the defendant by a deed which provided that, if the buildings were removed before a July 1, they should belong to the plaintiff, and otherwise should remain a part of the realty, and who had not removed the buildings before July 1, in which the plaintiff sought relief from forfeiture of the buildings because of alleged accident or mistake on his part as to votes and actions of the mayor and board of aldermen of the defendant. *Oesting v. New Bedford*, 396.

Repair of Bridges.

Under floor of a bridge over tracks of a railroad was held to be part of the "framework" of the bridge and not of its "surface," within the meaning of those words as used in St. 1906, c. 463, Part I, § 38, and the municipality was held bound to keep it in repair. *Selectmen of Natick v. Boston & Albany Railroad*, 229.

MUNICIPAL COURT.

See POLICE, DISTRICT AND MUNICIPAL COURTS.

NEGLIGENCE.

Attempt to exempt from Liability by Contract.

A stipulation in a bill of lading of goods transported by railroad, that the carrier shall not be liable for any loss or damage "by fire for any cause whatsoever occurring" during the transit, does not relieve the carrier from liability for loss of or damage to the goods by a fire caused by the negligence of the servants of the carrier. *P. Garvan, Inc., v. New York Central & Hudson River Railroad*, 275.

Action by an employee of a sleeping car company against a railroad corporation for personal injuries where one defense was that by a contract that

Negligence (continued).

the plaintiff had made with his employer he had exempted the defendant from liability, and it was held that there was evidence sufficient to warrant a finding that such contract was void because procured by fraud. *Kean v. New York Central & Hudson River Railroad*, 449.

Trespasser.

Action against a railroad corporation for injuries received by a girl who had passed from a passageway adjoining the defendant's freight yard to a track in such yard, where she was run over, which could not be maintained because the plaintiff was a trespasser when injured and there was no evidence of wanton or reckless misconduct on the part of the defendant or its employees. *Khinoveck v. Boston & Maine Railroad*, 170.

Volenti non fit Injuria.

Burden of proving the defense of *volenti non fit injuria*, in an action by an employee in a department store against her employer for personal injuries caused by negligence of the defendant in employing an incompetent person to run an elevator, was held to be on the defendant, and the question, whether that burden was sustained, was held rightly to have been submitted to the jury. *Leary v. William G. Webber Co.* 68.

Assumption of Risk.

By employees, see *post*, under subtitle *Employer's Liability*.

Action by a police officer against a street railway company for personal injuries received through negligence of the defendant's motorman, in which it was held that a finding was warranted that the plaintiff, who when injured was on the forward step of the car, was there by force of circumstances caused by negligence of the defendant's motorman, and did not assume the risk of the injury he sustained. *Ahern v. Boston Elevated Railway*, 506.

Due Care of Plaintiff.

Of a boy in a factory, injured by an unexplained starting of automatic machine which had so started once before to his knowledge. *Chiuccariello v. Campbell*, 582.

Of a workman in a factory who cleaned a certain machine with his finger instead of with a brush, relying on the machine not being started, and was injured when it was started. *Kushniski v. New England Biscuit Co.* 177.

Of an employee of a railroad corporation walking, without looking behind him, on a track where a regular train was due. *Porter v. New York, New Haven, & Hartford Railroad*, 271.

Of a passenger alleged to have been thrown down by the sudden starting of a street car as she was about to alight. *Garland v. Boston Elevated Railway*, 458.

Of the owner of an automobile which became stalled on a street railway track and was run into by a street car. *Keeney v. Springfield Street Railway*, 44.

Of one run into by a street car while driving a covered express wagon on a

- city street crowded with traffic. *Morrissey v. Boston Elevated Railway*, 424.
- Of one driving a horse and buggy upon street railway tracks from an intersecting street where his view of approaching cars was obstructed. *Smith v. Holyoke Street Railway*, 202.
- Of one driving across a street railway from an intersecting street and erroneously thinking that an approaching car was proceeding at a moderate rate of speed. *Farris v. Boston Elevated Railway*, 585.
- Of an employee of a sleeping car company who was thrown from the top of a car when a locomotive engine and baggage car were bumped into it. *Kean v. New York Central & Hudson River Railroad*, 449.
- Of the wife of a tenant in a three tenement house using a temporary step which had been provided by the landlord and had become defective. *Ward v. Blouin*, 140.
- Of a girl nine years of age with poor eyesight, who had known of a defect in a sidewalk in a private passageway before she was injured thereby. *Callahan v. Dickson*, 510.
- Of one who, without stating its value, delivered a valuable parcel to a corporation engaged in furnishing messengers to deliver parcels. *Murray v. Postal Telegraph-Cable Co.* 188.
- Failure, of one about to cross tracks of a street railway in a highway, to look into a cross street from which a team came and so obstructed his passage that he was struck by a passing car, is not as a matter of law a lack of due care which will bar recovery by him from the street railway company. *Meyski v. Boston Elevated Railway*, 341.

Due Care of Plaintiff's Decedent.

- Of one who, upon alighting from a street car, passed behind it upon a parallel track and was struck by a car there. *Kennedy v. Worcester Consolidated Street Railway*, 182.
- At a crossing of a railroad with a highway at grade. *Rodrigues v. New York, New Haven, & Hartford Railroad*, 805.

Employer's Liability.

Notice.

No action can be maintained under St. 1909, c. 514, § 127, by an employee against his employer for personal injuries alleged to have been caused by the unsafe condition of the defendant's premises by reason of accumulations of snow or ice without proving that the notice required by St. 1908, c. 305, was given to the defendant within ten days after the injury. *Paszkowski v. Stony Brook Paper Co.* 86.

Assumption of risk by employee.

Assumption by an employee in a factory of the risk of injury from having his clothing caught on a revolving shaft whose dangerous nature was known and appreciated by him, which prevented recovery from his employer although there were currents of air and a lack of light in the

Negligence (continued).

place where the accident happened and an accumulation of rust on the shaft. *Goulding v. Eastern Bridge & Structural Co.* 52.

Hole in a floor back of a loom in a cotton mill was held under the circumstances to be a defective and dangerous condition rendering the proprietor liable to an employee injured because of it, and not to be an obvious danger of which the employee assumed the risk. *Morley v. Union Cotton Manuf. Co.* 288.

Danger voluntarily incurred.

Burden of proving a defense of *volenti non fit injuria*, in an action by an employee in a department store against her employer for personal injuries caused by negligence of the defendant in employing an incompetent person to run an elevator, was held to be on the defendant, and the question, whether that burden was sustained, was held rightly to have been submitted to the jury. *Leary v. William G. Webber Co.* 68.

Ways, works or machinery.

No action can be maintained under St. 1909, c. 514, § 127, by an employee against his employer for personal injuries alleged to have been caused by the unsafe condition of the defendant's premises by reason of accumulations of snow or ice, without proving that the notice required by St. 1908, c. 805, was given to the defendant within ten days after the injury. *Paszkowski v. Stony Brook Paper Co.* 86.

Superintendence.

Failure of a superintendent in a silk factory to replace a guard after cleaning a machine, and his saying to the operator, "All right; now go ahead," were held not to be acts of superintendence which would make the employer liable in an action by an employee for injuries caused thereby. *Bedard v. Nonotuck Silk Co.* 361.

Injury, caused to an employee in a factory by a machine being started by a superintendent while the employee was cleaning it, was held to have been caused by negligence of the superintendent in deciding to start the machine then, which was a negligent act of superintendence for which the employer was liable, and not an act of a fellow servant of the employee. *Kushniski v. New England Biscuit Co.* 177.

Signal, switch, locomotive engine or train.

Action by an employee against a railroad corporation for injuries caused by the plaintiff being run into from behind by a train in the defendant's freight yard, where the plaintiff was held not to have been in the exercise of due care. *Porter v. New York, New Haven, & Hartford Railroad.* 271.

Dangerous and defective machinery and appliances.

A workman, whose duty it is to oil the shafting in a factory and who knows and appreciates the obvious danger of an injury caused by his clothing catching on a revolving shaft, assumes such risk and cannot recover from his employer for an injury thus caused, although at the place where the accident occurred there were currents of air and a lack of light and the

shaft had an accumulation of rust upon it. *Goulding v. Eastern Bridge & Structural Co.* 52.

Action by a boy in a can making factory for injuries caused by the automatic starting of a machine, where there was held to have been evidence of due care on the part of the plaintiff although the machine had started automatically once before he was hurt, and evidence of negligence on the part of the defendant because if the machine had been in order it would not have started and because its starting was unexplained. *Chiuccariello v. Campbell*, 582.

Railroad company was held not liable either at common law or under R. L. c. 106, § 71, for injuries received by an employee from the falling of a portion of a hatch combing while he was at work helping to unload a vessel which the company neither owned nor had anything to do with except to unload it after it had been made fast at a dock of the company, it not appearing what caused the combing to fall nor that the company or any of its employees knew or ought to have known that there was any danger that it would fall. *O'Malley v. New York, New Haven, & Hartford Railroad*, 844.

Dangerous place.

Assumption by an employee in a factory of the risk of injury from having his clothing caught on a revolving shaft, the dangerous nature of which was known and appreciated by him, which prevented recovery from his employer although there were currents of air and a lack of light in the place where the accident happened, and an accumulation of rust was on the shaft. *Goulding v. Eastern Bridge & Structural Co.* 52.

No action can be maintained under St. 1909, c. 514, § 127, by an employee against his employer for personal injuries alleged to have been caused by a condition of the defendant's premises which was unsafe by reason of accumulations of snow or ice without proving that the notice required by St. 1908, c. 805, was given to the defendant within ten days after the injury. *Paszowski v. Stony Brook Paper Co.* 86.

Hole in a floor back of a loom in a cotton mill was held under the circumstances to be a defective and dangerous condition rendering the proprietor liable to an employee injured because of it, and not to be an obvious danger of which the employee assumed the risk. *Morley v. Union Cotton Manuf. Co.* 288.

Employment of incompetent servant.

Burden of proving a defense of *volenti non fit injuria*, in an action by an employee in a department store against her employer for personal injuries caused by negligence of the defendant in employing an incompetent person to run an elevator, was held to be on the defendant, and the question, whether the burden was sustained, was held rightly to have been submitted to the jury. *Leary v. William G. Webber Co.* 68.

Fellow servant.

Injury, caused to an employee in a factory by a machine being started by a superintendent while the employee was cleaning it, was held to have been caused by negligence of the superintendent in deciding to start the ma-

Negligence (*continued*).

chine then, which was a negligent act of superintendence for which the employer was liable, and not the act of a fellow servant of the employee. *Kushnizki v. New England Biscuit Co.* 177.

Failure of a superintendent in a silk factory to replace a guard after cleaning a machine, and his saying to the operator "All right; now go ahead" were held not to be acts of superintendence which would make the employer liable in an action by an employee for injuries caused thereby. *Bedard v. Nonotuck Silk Co.* 861.

Vicious horse.

In an action by a hostler against the proprietor of a large livery stable employing him, for personal injuries due to the running away of a horse, it was held that certain evidence regarding particular instances of viciousness justified findings that the horse had a habit of running away, and that the defendant knew of this vicious habit. *Scanlon v. Cavanaugh*, 291.

Street Railway.

Police officer.

Action by a police officer against a street railway company for personal injuries received through negligence of the defendant's motorman, in which it was held that a finding was warranted that the plaintiff, who when injured was on the forward step of the car, was there by force of circumstances caused by negligence of the defendant's motorman, and did not assume the risk of the injury he sustained. *Ahern v. Boston Elevated Railway*, 506.

Person on highway.

At the trial of an action against a street railway corporation for personal injuries received by a laborer upon a highway, a statement signed for the defendant by one of its witnesses was improperly admitted in evidence in re-direct examination after the plaintiff had inquired regarding the statement in cross-examination. *Flaherty v. Boston & Northern Street Railway*, 821.

Failure, of one about to cross tracks of a street railway in a highway, to look into a cross street from which a team came and so obstructed his passage that he was struck by a passing car, is not as a matter of law a lack of due care which will bar recovery by him from the street railway company. *Meyshi v. Boston Elevated Railway*, 841.

One, who trotted or walked a horse and buggy upon street railway tracks from an intersecting street, thinking that an approaching car was going at a moderate rate of speed and who was struck by the car because the car was going at an unreasonable rate of speed, may be found to have been in the exercise of due care. *Farris v. Boston Elevated Railway*, 585.

Action against a street railway company by one who was struck by a car after having driven upon the street railway tracks from an intersecting street where his view of an approaching car was obstructed, where there was evidence that no gong was sounded and that the car was being run rapidly. *Smith v. Holyoke Street Railway*, 202.

Action against a street railway company by one, who while driving a pair of

horses attached to a covered express wagon in a city street where traffic was congested, was run into by a car of the defendant, where the questions of the due care of the plaintiff and negligence of the defendant's motorman were held to be for the jury. *Morrissey v. Boston Elevated Railway*, 424.

Action against a street railway company in which one, who was crossing behind a street car from which he had just alighted and was struck by a car on a parallel track, was held as a matter of law not to have been in the exercise of due care. *Kennedy v. Worcester Consolidated Street Railway*, 182.

In actions against a street railway company for personal injuries and damage to an automobile which, having become stalled at night upon the defendant's track, was run into by a car of the defendant, the evidence was held to warrant the submission to the jury of the questions of the due care of the plaintiffs and of the negligence of the defendant's motorman. *Keeney v. Springfield Street Railway*, 44.

Passenger: in station.

At the trial of an action by a woman against a corporation operating both a surface and an elevated railway for injuries alleged to have been received by the plaintiff, who while passing from one level to another of a station maintained by the defendant, was caused to fall into a pit by violence of the crowd as she was attempting to board a car, it was held that the question, whether the plaintiff's injuries were due to negligence of the defendant, was for the jury, who might have found that from the nature of its business the defendant should have foreseen the condition which gave rise to the plaintiff's injury and have provided against that injury by the adoption of reasonable expedients. *Kelley v. Boston Elevated Railway*, 454.

Testimony of superintendents of the defendant which was held admissible at such trial. *Ibid.*

Passenger: in car.

Sudden emergency which, in an action by a passenger who was thrown from a street car by a sudden lurch of the car on a curve of the track, was held not necessarily to excuse an error of judgment of the motorman in failing to use a hand brake when the air brake had refused to work. *Lemay v. Springfield Street Railway*, 63.

Findings by a judge, who without a jury heard an action by a woman against a street railway corporation for personal injuries sustained by reason of a jolt of a car on which the plaintiff was a passenger, that the jolt was not due to a defective condition of the car or to any defect in the roadbed or track or to any negligence in the operation of the car, were held not to be open to review upon exceptions. *Webber v. Old Colony Street Railway*, 432.

Such jolt, if unexplained, was held to be evidence of negligence of the defendant, but not to change the burden of proof, so that the judge on other evidence might find that the plaintiff had not sustained the burden of proof. *Ibid.*

Negligence (continued).

In such an action it was said that, if there was evidence that the plaintiff was suffering from physical conditions which made her peculiarly susceptible to a particular form of injury from the violent jolting of the car, it was not necessary for her to prove that the jolt was such that it would have caused, or was sufficient to cause, actual injury to a passenger in normal health in the same situation. *Webber v. Old Colony Street Railway*, 432.

Finding for the defendant, in an action against a street railway company for injuries to a passenger due to the falling upon him of a pole brought into the car by another passenger, was held justifiable. *Luddy v. Old Colony Street Railway*, 293.

Passenger : leaving car.

Action by a woman against a street railway company for injuries alleged to have been received by the plaintiff from being thrown to the ground by the sudden starting of a car as she was in the act of alighting, in which it was held that the questions, whether the plaintiff was exercising due care and whether the employees of the defendant were negligent, were for the jury. *Garland v. Boston Elevated Railway*, 458.

Elevated Railway.

At the trial of an action by a woman against a corporation operating both a surface and an elevated railway for injuries alleged to have been received by the plaintiff, who while passing from one level to another of a station maintained by the defendant, was caused to fall into a pit by violence of the crowd as she was attempting to board a car, it was held that the question, whether the plaintiff's injuries were due to negligence of the defendant, was for the jury, who might have found that from the nature of its business the defendant should have foreseen the condition which gave rise to the plaintiff's injury and have provided against that injury by the adoption of reasonable expedients. *Kelley v. Boston Elevated Railway*, 454.

Testimony of superintendents of the defendant which was held admissible in such action. *Ibid.*

Railroad.

Employee of sleeping car company.

Action of tort by an employee of a sleeping car company against a railroad company to recover for injuries alleged to have been caused by negligence of the employees of the defendant in causing an engine with a baggage car attached to it to be bumped violently into a car on the top of which the plaintiff was at work. *Kean v. New York Central & Hudson River Railroad*, 449.

At the trial of such an action evidence was admissible to prove a custom of conductors of the defendant to give warning to men working on the tops of cars of the fact that an engine was about to be attached. *Ibid.*

Injury to person on grade crossing.

The question, in an action under St. 1906, c. 463, Part I, § 68, as amended by St. 1907, c. 392, against a railroad corporation by the administrator of

the estate of one who was killed at the crossing of the railroad with a highway at grade, whether the plaintiff's intestate took any precautions for his safety at the crossing, was held to have been left on the evidence entirely to conjecture. *Rodrigues v. New York, New Haven, & Hartford Railroad*, 305.

Passenger: at station.

Statement and application of the requirements of the law with regard to the providing and maintaining of suitable station platforms by railroad corporations. *Savageau v. Boston & Maine Railroad*, 164.

In an action by a passenger against a railroad corporation to recover for personal injuries caused by the plaintiff being struck by a locomotive of the defendant while he was waiting on a station platform, it was held that there was no evidence tending to show that the engine was being run negligently. *Ibid*.

Passenger: on train.

Conspicuous painting on the door of a railroad car of a regulation forbidding passengers from riding on the platform or steps of any car, in the absence of evidence to show that the regulation was called to the attention of one who was killed while riding there and that he chose to disregard it, was held, in an action to recover for such death, not to be evidence tending to show that the plaintiff's intestate had ceased to be a passenger of the defendant. *Renaud v. New York, New Haven, & Hartford Railroad*, 553.

In such an action evidence of such a notice was held to be admissible without proof that the decedent knew of it, on the question, whether any of the employees of the defendant, who knew of and relied on a posting of the notice, had been guilty of gross negligence. *Ibid*.

In an action against a railroad corporation for injuries due to the door of a passenger car shutting on the plaintiff's hand, the fact that the door did not stay caught back after it was opened was held under the circumstances to be evidence that its failure to do so resulted from negligence of the defendant. *Kellogg v. Boston & Maine Railroad*, 324.

In freight yard.

Action by an employee against a railroad corporation for injuries caused by the plaintiff being run into by a train in the defendant's freight yard, where the plaintiff was held as a matter of law not to have been in the exercise of due care. *Porter v. New York, New Haven, & Hartford Railroad*, 271.

Action against a railroad corporation for injuries received by a girl who had passed from a passageway adjoining the defendant's freight yard to a track in the yard, where she was run over, which could not be maintained because the plaintiff was a trespasser when injured and there was no evidence of reckless or wanton misconduct on the part of the defendant or its employees. *Khinoveck v. Boston & Maine Railroad*, 170.

In unloading ship.

Railroad company was held not liable either at common law or under R. L. c. 106, § 71, for injuries received by an employee from the falling of a

Negligence (*continued*).

portion of a hatch combing while he was at work helping to unload a vessel which the company neither owned nor had anything to do with except to unload it after it had been made fast at a dock of the company, it not appearing what caused the portion of the combing to fall nor that the company or any of its employees knew or ought to have known that there was any danger that it would fall. *O'Malley v. New York, New Haven, & Hartford Railroad*, 344.

Causing fire.

Report of the detective department of the district police was held inadmissible in an action against a railroad corporation by one whose goods had been injured by fire while they were in the possession of the defendant as a carrier. *P. Garvan, Inc., v. New York Central & Hudson River Railroad*, 275.

Fact that goods in a sealed car were injured by fire while in a railroad freight yard was held to be evidence warranting submission to a jury of the question, whether the only reasonable origin of the fire involved negligence of employees of the railroad corporation. *Ibid.*

In Use of Highway.

Action against a street railway company in which one who was crossing behind a street car from which he had just alighted and was struck by a car on a parallel track was held as a matter of law not to have been in the exercise of due care. *Kennedy v. Worcester Consolidated Street Railway*, 132.

In an action against a street railway company by one who, while driving a pair of horses attached to a covered express wagon in a street where traffic was congested, was run into by a car of the defendant, the questions of the due care of the plaintiff and the negligence of the defendant's motorman were held to have been for the jury. *Morrissey v. Boston Elevated Railway*, 424.

Failure, of one about to cross tracks of a street railway in a highway, to look into a cross street from which a team came and so obstructed his passage that he was struck by a passing car, is not as a matter of law a lack of due care which will bar recovery by him from the street railway company. *Meyers v. Boston Elevated Railway*, 341.

One, who trotted or walked a horse and buggy upon street railway tracks from an intersecting street, thinking that an approaching car was going at a moderate rate of speed, and who was struck by the car because it was going at an unreasonable rate of speed, may be found to have been in the exercise of due care. *Farris v. Boston Elevated Railway*, 535.

In actions against a street railway company for personal injuries and damage to an automobile which, having become stalled at night upon the defendant's track, was run into by a car of the defendant, the evidence was held to warrant the submission to the jury of the questions of the due care of the plaintiff and of negligence of the defendant's motorman. *Keeney v. Springfield Street Railway*, 44.

Proprietor of a "reach wagon" transporting long rails on a public street is under no duty to have a person in attendance to prevent travellers on the street from being struck by the rear wheels. *Stuart v. Holyoke Street Railway*, 240.

In Use of Automobile.

In actions against a street railway company for personal injuries and damage to an automobile which, having become stalled at night upon the defendant's track, was run into by a car of the defendant, the evidence was held to warrant the submission to the jury of the questions of the due care of the plaintiff and of negligence of the defendant's motorman. *Keeney v. Springfield Street Railway*, 44.

Of One owning or controlling Real Estate.

An employee of a subtenant of a part of a floor of a building, in which there was a freight elevator for the use of tenants, who operated it in the transportation of materials, was held not to be entitled under the circumstances to recover from the owner of the building for an injury caused by the elevator not resting evenly on the floor of the well before being started. *Baum v. Ahlborn*, 336.

In an action against the owner of a store by a regular customer to recover for personal injuries caused by a wooden leg of the customer going through a walk which was an approach to the store, it was held to be proper for the jury to consider, as bearing on the question whether the defendant was negligent, the fact that the plaintiff was a regular customer and such knowledge as the defendant might have had of the plaintiff's infirmity. *Ferron v. King*, 75.

In such action, evidence tending to show a defective condition which had existed for some time before the injury and which reasonable inspection would have discovered, was held to be sufficient to warrant submitting to the jury the question, whether the defendant knew or should have known of the defect. *Ibid.*

Action against a landlord for injuries caused to the wife of a tenant by a defective condition of a temporary step provided by the landlord and used in common by several tenants. *Ward v. Blouin*, 140.

Action by a girl against the landlord of a tenement in which she lived with her father, for personal injuries caused by a defect in a plank walk at the side of a passageway leading from the tenement to a highway, in which the questions of the plaintiff's due care and of the defendant's negligence were held to be for the jury. *Callahan v. Dickson*, 510.

In an action against one alleged to be the owner of certain real estate for personal injuries due to a defective condition of the land at its junction with a public sidewalk, it was held that, if the title to the real estate was in another under an oral agreement for the defendant's benefit, there could be no recovery unless the defendant was in occupation of the land or had undertaken its management and control. *Curry v. Dorr*, 480.

Negligence (*continued*).

In Use of Elevator.

Action by an employee in a department store against her employer for personal injuries caused by negligent operation of an elevator, where a defense was that the accident was due to incompetence of the person running the elevator, which the plaintiff knew and assumed the risk of. *Leary v. William G. Webber Co.* 68.

An employee of a subtenant of a part of a floor of a building, in which there was a freight elevator for the use of the tenants who operated it in the transportation of materials, was held not to be entitled under the circumstances to recover from the owner of the building for an injury caused by the elevator not resting evenly on the floor of the well before being started. *Baum v. Ahlborn*, 336.

In Use of "Reach Wagon."

Proprietor of a "reach wagon" transporting long rails on a public street is under no duty to have a person in attendance to prevent travellers on the street from being struck by the rear wheels. *Stuart v. Holyoke Street Railway*, 240.

In Use of Easement.

Elements of damage recoverable in an action by a manufacturing company, which had a right to maintain a canal to draw water for its mill from a certain pond subject to the right of an ice company to cut and take ice from the pond and the canal, against the ice company for alleged negligence in constructing and maintaining a runway through the bank of the canal. *Moore Spinning Co. v. Boston Ice Co.* 364.

In Freight Yard.

Action by an employee against a railroad corporation for injuries caused by the plaintiff being run into by a train in the defendant's freight yard where the plaintiff was held as a matter of law not to have been in the exercise of due care. *Porter v. New York, New Haven, & Hartford Railroad*, 271.

At Railroad Crossing.

The question, whether in an action under St. 1906, c. 468, Part I, § 63, as amended by St. 1907, c. 392, against a railroad corporation by the administrator of the estate of one who was killed at a crossing of the railroad with a highway at grade, the plaintiff's intestate took any precautions for his safety at the crossing, was held to have been left on the evidence entirely to conjecture. *Rodrigues v. New York, New Haven & Hartford Railroad*, 305.

Of Messenger Boy.

Action against a corporation, engaged in the business of furnishing messengers to carry parcels, to recover for the loss of a parcel because of the negligence of one to whom it was transferred for delivery, in which it was held that the employee of the defendant who lost the parcel under

the circumstances was not an agent of the plaintiff, and that the case was distinguishable from *Haskell v. Boston District Messenger Co.* 190 Mass. 189. *Murray v. Postal Telegraph-Cable Co.* 188.

Instructions in such action to the effect that it was common knowledge that such a corporation did not undertake to deliver parcels of great value, and that, if the plaintiff delivered such a parcel to the defendant's servant without disclosing its value, he was not in the exercise of due care and could not recover, were held to be erroneous. *Ibid.*

If a corporation engaged in the business of furnishing upon application messengers for the delivery of parcels receives a parcel from a customer as a bailee and not under such circumstances that any of its servants or agents becomes a servant or agent of the customer, and if the parcel is misdelivered by its employee, this constitutes a conversion for which the corporation is liable. *Ibid.*

Automatic Starting of a Machine.

Action by a boy in a can making factory for injuries caused by the automatic starting of a machine, where there was held to have been evidence of due care on the part of the plaintiff although the machine had started automatically once before he was hurt, and evidence of negligence on the part of the defendant because if the machine had been in order it would not have started and because its starting was unexplained. *Chiuccariello v. Campbell*, 582.

In a Factory or Mill.

Injury, caused to an employee in a factory by a machine being started by a superintendent while the employee was cleaning it, was held to have been caused by negligence of the superintendent in deciding to start the machine then, which was a negligent act of superintendence for which the employer was liable, and not an act of a fellow servant of the employee. *Kushnizki v. New England Biscuit Co.* 177.

Assumption by an employee in a factory of the risk of injury from having his clothing caught on a revolving shaft, the dangerous nature of which was known and appreciated by him, which prevented recovery from his employer although there were currents of air and a lack of light in the place where the accident happened, and an accumulation of rust was on the shaft. *Goulding v. Eastern Bridge & Structural Co.* 52.

Hole in a floor back of a loom in a cotton mill was held under the circumstances to be a defective and dangerous condition rendering the proprietor liable to an employee injured because of it, and not to be an obvious danger of which the employee assumed the risk. *Morley v. Union Cotton Manuf. Co.* 288.

Failure of a superintendent in a silk factory to replace a guard after cleaning a machine, and his saying to the operator "All right; now go ahead" were held not to be acts of superintendence which would make the employer liable in an action by an employee for injuries caused thereby. *Bedard v. Nonotuck Silk Co.* 361.

Action by a boy in a can making factory for injuries caused by the auto-

Negligence (continued).

matic starting of a machine, where there was held to have been evidence of due care on the part of the plaintiff although the machine had started automatically once before he was hurt, and evidence of negligence on the part of the defendant because if the machine had been in order it would not have started and because its starting was unexplained. *Chiuccariello v. Campbell*, 532.

Vicious Horse.

In an action by a hostler against the proprietor of a large livery stable employing him, for personal injuries due to the running away of a horse, it was held that certain evidence regarding particular instances of viciousness justified findings that the horse had a habit of running away, and that the defendant knew of the habit. *Scanlon v. Cavanaugh*, 291.

Of Police Officer.

Action by a police officer against a street railway company for personal injuries received through negligence of the defendant's motorman, in which it was held that a finding was warranted that the plaintiff, who when injured was on the forward step of the car, was there by force of circumstances caused by negligence of the defendant's motorman, and did not assume the risk of the injury he sustained. *Ahern v. Boston Elevated Railway*, 506.

Causing Fire.

Fact that goods in a sealed car were injured by fire while in a railroad freight yard was held to be evidence warranting submission to a jury of the question, whether the only reasonable origin of the fire involved negligence of employees of the railroad corporation. *P. Garvan, Inc., v. New York Central & Hudson River Railroad*, 275.

Report of the detective department of district police was held inadmissible in an action against a railroad corporation by one whose goods had been injured by fire while they were in the possession of the defendant as a carrier. *Ibid.*

Causing Death.

St. 1906, c. 463, Part II, § 245, establishing liability on the part of a railroad corporation where the death of a traveller on a highway is caused by a failure to give the signals required by § 147, is applicable only where the death is caused by a locomotive or a locomotive with a car or cars attached to it. *Rodrigues v. New York, New Haven, & Hartford Railroad*, 305.

The question, whether the plaintiff in an action under St. 1906, c. 463, Part I, § 63, as amended by St. 1907, c. 392, against a railroad corporation by the administrator of the estate of one who was killed at the crossing of the railroad with a highway at grade took any precautions for his safety at the crossing, was held to have been left on the evidence entirely to conjecture. *Ibid.*

Conspicuous painting on the door of a railroad car of a regulation forbidding passengers from riding on the platform or steps of any car, in the absence

of evidence to show that the regulation was called to the attention of one who was killed while riding there and that he chose to disregard it, was held, in an action to recover for such death, not to be evidence tending to show that the plaintiff's intestate had ceased to be a passenger of the defendant. *Renaud v. New York, New Haven, & Hartford Railroad*, 553.

In such an action evidence of such a notice was held to be admissible without proof that the decedent knew of it, on the question, whether any of the employees of the defendant, who knew of and relied on the posting of the regulation, had been guilty of gross negligence. *Ibid*.

Gross Negligence.

Evidence of the posting of a regulation by a railroad corporation which was held to be relevant, in an action for the death of a passenger who met death while violating the regulation, but who was not shown to have known of the regulation, on the question whether employees of the corporation, who knew of and relied on such posting, were grossly negligent. *Renaud v. New York, New Haven, & Hartford Railroad*, 553.

At the trial of an action against a railroad corporation for injuries received at a railroad crossing at which the plaintiff was struck by a train on which no bell was rung or whistle blown, evidence as to the conduct of the plaintiff as he approached the crossing was held not as matter of law to sustain the burden, which was on the defendant, of showing that the plaintiff was guilty of gross or wilful negligence. *Engleman v. Boston & Maine Railroad*, 179.

Res ipsa loquitur.

Fact that goods in a sealed car were injured by fire while in a railroad freight yard was held to be evidence warranting a submission to a jury of the question, whether the only reasonable origin of the fire involved negligence of employees of the railroad corporation. *P. Garvan, Inc., v. New York Central & Hudson River Railroad*, 275.

Action by a boy in a can making factory for injuries caused by the automatic starting of a machine, where there was held to have been evidence of negligence on the part of the defendant, because if the machine had been in order it would not have started, and because its starting was unexplained. *Chiuccariello v. Campbell*, 532.

In an action against a railroad company for injuries due to the door of a passenger car shutting on the plaintiff's hand, the fact that the door did not stay caught back after it was opened was held under the circumstances to be evidence that its failure to do so resulted from negligence of the defendant. *Kellogg v. Boston & Maine Railroad*, 324.

At the trial before a judge without a jury of an action against a street railway corporation for personal injuries sustained by an unusual jolt of a car on which the plaintiff was a passenger, the jolt, if unexplained, was held to be evidence of the defendant's negligence, but not to change the burden of proof which still was upon the plaintiff, so that the judge might find on all the evidence that the plaintiff had not sustained the burden of proof. *Webber v. Old Colony Street Railway*, 432.

NEW TRIAL.

See that subtitle under PRACTICE, CIVIL.

NOTICE.

Requirement of notice under St. 1908, c. 805, as condition precedent to liability of an employer for injuries caused to employee by a condition of the premises due to an accumulation of snow and ice. *Paszowski v. Stony Brook Paper Co.* 86.

Recital, in a decree of fence viewers under R. L. c. 38, § 6, that due notice had been given to an adjoining owner of a hearing for assessing the value of a part of a partition fence, is evidence that such notice was given. *Leonard v. Lyon*, 248.

Requirement of Superior Court Rule 41 as to delivery to adverse counsel of a notice of the filing of a motion for a new trial was held to have been complied with by the depositing of such a notice in the mail on the day it was filed in accordance with Rule 27. *Gloucester Mutual Fishing Ins. Co. v. Hall*, 332.

NUISANCE.

Facts in evidence in an action against a corporation for injuries caused by the plaintiff's horse being thrown down by wires stretched across a highway, which were held to warrant an inference that the defendant and the corporation which was responsible for the wires being so strung were identical. *Murphy v. Fred T. Ley & Co., Inc.*, 371.

In an action against one alleged to be the owner of certain real estate for personal injuries due to a defective condition of the land at its junction with a public sidewalk, it was held that, if the title to the real estate was in another under an oral agreement for the defendant's benefit, there could be no recovery unless the defendant was in occupation of the land or had undertaken its management and control. *Curry v. Dorr*, 480.

OFFICER.

As to compensation of a dog officer, see *O'Neill v. County of Worcester*, 374. Extrinsic evidence is not admissible to contradict or control the return upon an execution of an officer who was authorized to act under the execution. *Blake v. Rogers*, 588.

The fact that the requirements of R. L. c. 178, § 28, were observed at a sale of real estate on an execution may be proved by the execution with the return thereon of the officer who made the sale, if such return in substance and with certainty shows compliance with the statutory requirements although it contains verbal departures from the wording of the statute. *Ibid.*

Officer's return which was sufficient for such purpose. *Ibid.*

A deputy sheriff who is in possession of property under attachment upon writs in different actions against the same defendant is the officer who

must receive and levy all executions which may issue in any of the actions, and he may refuse to deliver the property to another officer who demands it by virtue of an execution in one of the actions. *Beaulieu v. Clark*, 90. Police officer, see POLICE.

ORDER.

See that subtitle under **BILLS AND NOTES**.

PARDON.

As to pardon or commutation of sentence by concurrent action of the Governor and Council, see *Opinion of the Justices*, 609.

PARTNERSHIP.

Settlement of accounts between two partners which was held to be a final settlement into which all claims were merged, so that a suit for an accounting between the partners could not be maintained thereafter. *Coffey v. Coffey*, 480.

PASSENGER.

One who is within a station used by a corporation operating both a surface and an elevated railway and is passing from one car to another is a passenger of the corporation. *Kelley v. Boston Elevated Railway*, 454. Other actions by passengers against street railway and railroad corporations, see NEGLIGENCE, *Street Railway: Passenger*; *Railroad: Passenger*.

PAYMENT.

The presumption of fact, which exists in this Commonwealth, that a negotiable promissory note given for an unsecured simple contract debt was given and taken in payment of that debt, is not to be extended as of course to the case of a debt secured by a lien. *Cary Brick Co. v. Wheeler*, 388.

Application of the foregoing proposition of law, in a petition for the enforcement of a mechanic's lien where the respondent, claiming credit on account of a promissory note given by him to the petitioner but never paid, was held to have the burden of proving that the note was given and taken as payment. *Ibid*.

Where an insolvent person purchases goods from one who knows of his insolvency and gives therefor checks dated ten days ahead, which checks afterwards are paid, such payments may be found to have been made in satisfaction of antecedent debts and to have been preferences within § 60, a, b, of the bankruptcy act of 1898 as amended in 1903. *Brown v. Pelonsky*, 502.

Action upon a conditional order in writing accepted by the defendant where it was held to be a question for the jury whether a certain payment was the result of a final accounting which would fulfil the conditions of the order. *Millen v. Williams*, 516.

PERJURY.

As to what evidence is competent, at the trial of an indictment for perjury, to prove the making by the defendant of the statements alleged to have been false. *Commonwealth v. Shookhanian*, 128.

PLEADING, CIVIL.

Declaration.

An exception to a refusal of a trial judge to make a ruling correct upon the pleadings may be overruled upon the condition of the allowance of an amendment to the declaration supported by the evidence, if the case was submitted fairly to the jury on the issues presented by the amendment. *Lemay v. Springfield Street Railway*, 68.

Plea in Abatement.

The non-joinder of a plaintiff in an action of tort can be taken advantage of only by a plea in abatement. *Thomson v. Pentecost*, 228.

The objection that an action is brought in the wrong county can be taken advantage of only by a plea in abatement. *Silver v. Graves*, 26.

So also of an objection that a notice to a non-resident defendant under R. L. c. 170, § 5, was not given. *Johnson v. Carr*, 1.

Demurrer.

A motion to strike out a demurrer which in form is substantially in accordance with the wording of R. L. c. 178, § 16, cl. 2, properly may be denied. *Norton v. Lilley*, 214.

Where, upon the sustaining of a demurrer in the Superior Court, the plaintiff alleges an exception, no judgment should be directed to be entered until the exception is overruled unless the exception is adjudged immaterial, frivolous or intended for delay. *Ibid.*

Answer.

Defense, that a contract is invalid because it was made on the Lord's day, must be pleaded specifically in order to be relied on. *Silver v. Graves*, 26.

Defense of *volenti non fit injuria*, in an action of tort for personal injuries where the defendant is shown to have been at fault, is an affirmative defense which must be pleaded as such by the defendant. *Leary v. William G. Webber Co.* 68.

In an action upon a promissory note given as part payment for a soda fountain to be installed by the plaintiff, the defendant, who has not filed an answer in recoupment, cannot claim an allowance for damages caused by carelessness of the plaintiff in the installation of the fountain. *Puffer Manuf. Co. v. Krum*, 211.

Replication.

Because the plaintiff in an action at law in which the defendant has set up a release can prove that the release was obtained by fraud without filing

a replication to that effect, a judge of the Superior Court has power to strike such a replication from the records. *Comstock v. Livingston*, 581.

Variance.

Certain variance between different counts in an action of tort or contract and between the allegations in the counts and the findings which were warranted by the evidence were held to be immaterial. *Barry v. Woodbury*, 521.

Variance between a declaration and an offer of proof made by the plaintiff's counsel in his opening address to the jury, which under the circumstances was held not to prevent the sustaining of exceptions by the plaintiff to the ordering of a verdict for the defendant upon such offer of proof. *Ward v. Blouin*, 140.

It is not open to a defendant at the argument in this court of an exception by the plaintiff to a ruling that upon all the evidence introduced at the trial of a case the plaintiff could not recover, to contend that the verdict was ordered properly because there was a fatal variance between the cause of action alleged in the declaration and the evidence, no question upon the pleadings having been raised by the ruling requested by the defendant on which the verdict was ordered. *Kellogg v. Boston & Maine Railroad*, 324.

PLEADING, CRIMINAL.

Complaint.

Complaint for violation of St. 1909, c. 514, § 48, regarding the hours of employment of women and children, which was held to be sufficient. *Commonwealth v. Riley*, 387.

PLEDGE.

Replevin of a wagon against a deputy sheriff who had attached it in a suit against a partnership, which it was held might be maintained because, although the partnership had taken possession of the wagon directly from one who sold it to them, the plaintiff before the attachment had taken possession of it under an agreement with the partnership pledging it as security for the purchase money which he had advanced. *Garnson v. Prichard*, 296.

POLICE.

A police officer, charged with the regulation of traffic in a city at a crossing of streets where street cars and other vehicles pass, in order faithfully to perform his whole duty may find himself compelled to get upon a step of a car where he may be exposed to injury and where passengers are not invited or expected to stand. *Ahern v. Boston Elevated Railway*, 506.

Action by a police officer against a street railway company for personal injuries received through negligence of the defendant's motorman, in which it was held that a finding was warranted that the plaintiff when injured

Police (continued).

was on the forward step of the car by force of circumstances caused by negligence of the defendant's motorman and did not assume the risk of the injury he sustained. *Ahearn v. Boston Elevated Railway*, 506.

POLICE, DISTRICT AND MUNICIPAL COURTS.

Under R. L. c. 8, § 4, cl. 2, if at the time of the commission of a certain crime and of the commencement of proceedings in a police, district or municipal court for the punishment thereof, such court has jurisdiction thereof, and before sentence is imposed a statute is passed repealing the statute granting such jurisdiction, a valid sentence nevertheless may be imposed in the proceedings originally begun. *Commonwealth v. Drohan*, 445.

Under the provisions of St. 1909, c. 442, giving to police, district and municipal courts jurisdiction of the crime of larceny of property not exceeding \$300 in value and empowering them to impose the same penalties as the Superior Court in like cases has power to impose, except imprisonment in the State prison, a complaint in such a court for such an offense is not open to the objection that it charges a felony. *Ibid.*

POWER.

Suit in equity to compel the completion of an imperfect execution of a power under a will. *Coates v. Lunt*, 814.

PRACTICE, CIVIL.

Absent or Non-resident Defendant.

Procedure in an action against an absent or non-resident defendant, see *Johnson v. Carr*, 1.

The return of an officer upon a writ, that after diligent search he was unable to find within the Commonwealth a last and usual place of abode of the defendant so that he could serve the writ, was held not to show that the defendant was a non-resident so that a notice under R. L. c. 170, § 5, was required instead of the notice required by § 6 upon a person merely absent from the Commonwealth. *Ibid.*

And a decree of the Probate Court under R. L. c. 144, appointing a receiver of the property of a person on the ground that he had disappeared and that his whereabouts were unknown, also was held not to show necessarily that the absentee was such a non-resident. *Ibid.*

The denial of a motion to dismiss an action because the defendant was a non-resident of the Commonwealth and the notice required by R. L. c. 170, § 5, was not given, is a decision only upon the facts appearing of record and does not prevent the defendant from pleading the same facts in abatement and proving them by evidence outside the record. *Ibid.*

A failure of the plaintiff in an action at law to give to a non-resident defendant the notice required by R. L. c. 170, § 5, should be pleaded in abatement and not in bar. *Ibid.*

Parties.

The non-joinder of a plaintiff in an action of tort can be taken advantage of only by a plea in abatement. *Thomson v. Pentecost*, 223.

See also preceding subtitle.

Venue.

The objection that an action of contract is brought in the wrong county by reason of the residence of the parties, all of whom are residents of the Commonwealth, can be taken only by a plea in abatement, and the question cannot be raised for the first time by a request for a ruling at the close of a trial. *Silver v. Graves*, 26.

Motion to dismiss.

Although, upon a motion to dismiss, only the record before the court is considered, on account of the assumption of the parties in the argument in this case, "the record" was treated as including besides the record of the case itself the record of certain material proceedings in the Probate Court which had been before the court to which the motion to dismiss was addressed. *Johnson v. Carr*, 1.

The denial of a motion to dismiss an action was held not to prevent the defendant from pleading in abatement the same facts relied on in the motion and maintaining his plea by proof of those facts by evidence outside the record. *Ibid*.

Abatement.

Objection that an action is brought in a wrong county can be taken only by a plea in abatement. *Silver v. Graves*, 26.

The non-joinder of a plaintiff in an action of tort can be taken advantage of only by a plea in abatement. *Thomson v. Pentecost*, 223.

Under the provision of R. L. c. 170, § 5, that, "if real property of a non-resident is attached and no personal service is made upon the defendant, the action shall be dismissed unless notice thereof is given in such a manner as the court orders within one year after the entry of the action," the failure to give such notice is matter of abatement and must be pleaded in abatement and not in bar. *Johnson v. Carr*, 1.

Motion to strike out Replication.

Because the plaintiff in an action at law in which the defendant has set up a release can prove that the release was obtained by fraud without filing a replication to that effect, a judge of the Superior Court has power to strike such a replication from the records. *Comstock v. Livingston*, 581.

Dismissal for Want of Prosecution.

Where, in an action which was dismissed under a general order of the Superior Court because nothing had been done therein within a year, it is shown by the records of that court that there had been proceedings in the action within the year next preceding the judgment of dismissal but it does not appear that there had been any clerical error in the entry of that judgment, this

Practice, Civil (*continued*).

does not give the Superior Court jurisdiction to grant a motion to vacate the judgment where the motion was filed more than one year after the judgment was entered. *Karrick v. Wetmore*, 578.

A judgment of dismissal entered in due course in an action in the Superior Court, which was called and dismissed pursuant to a general order of that court to that effect applying to all cases in which no action has been taken within the year next preceding, is a final judgment within the meaning of R. L. c. 193, § 15, which requires that a petition to vacate a final judgment shall be filed within one year after the entry of such judgment. *Ibid*.

Discontinuance.

A petition for a writ of review of a judgment of the Superior Court, which was discontinued by the petitioner by leave of court without costs before any trial was had upon it, does not estop the petitioner from maintaining a petition for a writ of error to reverse the same judgment upon substantially the same grounds as those alleged in his petition for a writ of review. *Karrick v. Wetmore*, 578.

Motion for Continuance.

Motion for continuance of a case in order for hearing on a demurrer in the Superior Court, which was based on allegations in substance that all the judges of that court were in a conspiracy to treat the plaintiff in a hostile manner, properly was denied. *Norton v. Lilley*, 214.

Amendment.

An exception to a refusal by a trial judge to make a ruling correct upon the pleadings may be overruled upon the condition of the allowance of an amendment of the declaration supported by the evidence, if the case was submitted fairly to the jury on the issues presented by the amendment. *Lemay v. Springfield Street Railway*, 68.

Auditor's Report.

The proper way to correct a mistake made by an auditor on a question of law is by instructions of the judge to the jury. *Greene v. Corey*, 536.

It is proper for the judge presiding at the trial of a case when a report of an auditor containing rulings of law is offered in evidence, to exclude such rulings from the jury, since they are not strictly to be regarded as parts of the report, not containing any findings of fact and not being evidence for the jury. *Ibid*.

Refusal of a judge presiding at a trial to instruct the jury that a statement in the report of the auditor to whom the case had been referred, finding "that the defendant owes the plaintiff" a certain sum should not be considered, was held, when taken in connection with the charge to the jury, not to be prejudicial. *Moore Spinning Co. v. Boston Ice Co.* 364.

Election between Counts.

Proper refusal by a judge, presiding at the trial of an action against a carrier for damages resulting from injury to goods of the plaintiff while in the de-

defendant's possession, to compel the plaintiff to elect between a count for negligence and a count in contract for money received by the defendant at a sale of the damaged goods after the plaintiff had refused them. *P. Garvan, Inc., v. New York Central & Hudson River Railroad*, 275.

Cases tried together.

Fact that there could not be both a recovery by the plaintiff in an action of deceit and upon a plea in recoupment of damages in a cross action upon a promissory note was held to render immaterial an exception by the defendant in the cross action to certain evidence on the question of fraud. *Townsend v. Niles*, 524.

Hearing by Judge without Jury.

No exception lies to the refusal of a judge by whom an action at law is heard without a jury to make particular findings of fact. *O'Neill v. County of Worcester*, 874.

A judge, hearing an action at law without a jury, in refusing a request for a ruling founded upon evidence is required to state expressly or by fair inference either that the legal proposition presented is unsound or inapplicable, or that the facts upon which it is predicated are not found to be true. *John Hetherington & Sons, Ltd., v. William Firth Co.* 8.

Where, at the hearing of an action at law by a judge without a jury, at the close of the evidence a ruling is asked for such as should have been given if the trial had been before a jury, an exception to a refusal to give it must be sustained unless the ground of refusal is distinctly stated or plainly appears in some way on the record and is such that no harm is done by the refusal, or unless it is obvious on the whole record that no rights of the parties have been endangered. *Ibid.*

Construction of certain language in a bill of exceptions with regard to what disposition a judge who heard the case without a jury made of certain requests for rulings. *Ibid.*

Finding for the plaintiff by a judge hearing a case without a jury where the defendant, after testifying in direct contradiction to the plaintiff's evidence, had asked the judge to find the facts in accordance with his testimony and on such facts to rule that the plaintiff cannot recover, necessarily implies that the judge did not believe the defendant's testimony and refused to make the finding and ruling asked for by him, and the defendant can have no ground for an exception. *Ingram v. Marston*, 327.

Findings by a judge without a jury in an action by a woman against a street railway corporation for personal injuries sustained by a jolt of a car on which the plaintiff was a passenger, that the jolt was not due to a defective condition of the car or any defect in the roadbed or track or to any negligence in the operation of the car, were held not to be open to review upon exceptions. *Webber v. Old Colony Street Railway*, 432.

The jolt in that case, if unexplained, was held to be evidence of negligence of the defendant, but not to change the burden of proof, so that the judge on other evidence might find the defendant not negligent. *Ibid.*

Conduct of Trial.

Opening statement of counsel.

A statement of counsel for the plaintiff in an action of contract in opening the case to the jury was held not to limit the scope of the action as set out in the declaration. *Marcy v. Shelburne Falls & Colrain Street Railway*, 197. Verdict which was held wrongly to have been ordered for the defendant on the opening statement of the plaintiff's counsel to the jury. *Ward v. Blouin*, 140.

Auditor's report.

The proper way to correct a mistake made by an auditor in his report on a question of law is by instructions of the judge to the jury. *Greene v. Corey*, 536.

It is proper for the judge presiding at the trial of a case when a report of an auditor containing rulings of law is offered in evidence, to exclude such rulings from the jury, since they are not to be regarded as parts of the report, not containing any findings of fact and not being evidence for the jury. *Ibid.*

Order of evidence.

Application of the rule that the regulation of the order in which evidence shall be admitted is within the discretion of the trial judge. *Greene v. Corey*, 536.

Expert witnesses.

Discretionary power of a trial judge in determining as to the qualifications of a witness offered as an expert. *Greene v. Corey*, 536.

Redirect examination of witnesses.

Exclusion of questions asked in the redirect examination of a witness is within the discretionary power of the presiding judge. *Garland v. Boston Elevated Railway*, 458.

Requests and rulings.

No exception lies to the refusal of a judge by whom an action at law is heard without a jury to make particular findings of fact. *O'Neill v. County of Worcester*, 374.

Duty of a judge, who hears an action at law without a jury, as to stating his reasons for refusing to give rulings founded on evidence. *John Hetherington & Sons, Ltd., v. William Firth Co.* 8.

Construction of certain language in a bill of exceptions with regard to what disposition a judge who heard the case without a jury made of certain requests for rulings, some of which contained assumptions of fact. *Ibid.*

No exception lies to the refusal of the judge presiding at the trial of an action at law to make rulings upon requests presented before the introduction of any evidence. *Comstock v. Livingston*, 581.

Proper modification of a ruling by a judge in his charge to the jury. *Savageau v. Boston & Maine Railroad*, 164.

Proper refusal of a ruling requested by the defendant as to a comment in argument by the counsel for the plaintiff upon the absence of witnesses

to testify to matters material to the defendant's case. *Kean v. New York Central & Hudson River Railroad*, 449.

Where in an action at law a defendant's bill of exceptions shows that the only exceptions taken by him at the trial were to refusals of the presiding judge to make certain rulings which he asked for, possible errors in the charge to the jury cannot be considered. *Ahern v. Boston Elevated Railway*, 506.

Refusal of certain requests for rulings which was held not to warrant the sustaining of exceptions thereto because under correct instructions given to the jury the rulings were inapplicable to the case. *Ibid.*

Closing argument of counsel.

Proper refusal of a ruling requested by the defendant as to a comment in argument by the counsel for the plaintiff upon the absence of witnesses to testify to matters material to the defendant's case. *Kean v. New York Central & Hudson River Railroad*, 449.

Judge's charge.

The proper way to correct a mistake made by an auditor in his report on a question of law is by instructions of the judge to the jury. *Greene v. Corey*, 586.

Charge of judge which was held not to be improper because it contained a repetition and emphasis of propositions of law. *Savageau v. Boston & Maine Railroad*, 164.

Comments by a judge upon the evidence at a certain trial which were germane to the issues and were held not to have been improper. *Marcy v. Shelburne Falls & Colrain Street Railway*, 197.

Proper comments by a judge in his charge at the trial of an action for deceit to the effect that difficulty in ascertaining with exactness what the damages should be should not lead the jury to exempt the defendant from any part of the consequences of his fraud. *Thomson v. Pentecost*, 228.

Where no question was raised as to the charge of the judge at the trial of an action and it was not reported in a bill of exceptions, the case must be taken to have been submitted to the jury with full and correct instructions. *Townsend v. Niles*, 524.

Charge of a judge which cured an error made by him in refusing to order a verdict. *Moore Spinning Co. v. Boston Ice Co.* 364.

Refusal of a judge presiding at a trial to instruct the jury that a statement in the report of an auditor to whom the case had been referred, finding "that the defendant owes the plaintiff" a certain sum should not be considered, was held, when taken in connection with the charge to the jury, not to be prejudicial. *Ibid.*

Where in an action at law a defendant's bill of exceptions shows that the only exceptions taken by him at the trial were to refusals of the presiding judge to make certain rulings which he asked for, possible errors in the charge to the jury cannot be considered. *Ahern v. Boston Elevated Railway*, 506.

Refusal of certain requests for rulings which were held not to warrant the sustaining of exceptions thereto because under correct instructions given to the jury the rulings were inapplicable to the case. *Ibid.*

Ordering Verdict.

At the trial of an action of contract, where upon issues of fact the evidence is conflicting and the burden of proof rests on the plaintiff, the jury must pass upon the credibility and the weight of the testimony and a request that a verdict be ordered for the plaintiff manifestly should be refused. *Marcy v. Shelburne Falls & Colrain Street Railway*, 197.

In an action upon a written agreement by the defendant to receive and pay for certain volumes, a year's subscription to a certain periodical to be given to the defendant free, a verdict should not have been ordered for the plaintiff for the full contract price, because there was evidence that the periodical was sent to the defendant only for two weeks. *Friedman v. Pierce*, 419.

Verdict which was held wrongly to have been ordered for the defendant on the opening statement of the plaintiff's counsel to the jury. *Ward v. Blouin*, 140.

Charge of a judge which cured an error made by him in refusing to order a verdict. *Moore Spinning Co. v. Boston Ice Co.* 364.

Verdict.

Power of the Superior Court as to the setting aside of a verdict for the plaintiff in an action of tort because of inadequacy of the damages and as to the granting of a new trial on the question of damages only. *Simmons v. Fish*, 563.

In an action of contract, where the jury has returned a general verdict for the defendant, an exception by the plaintiff to the exclusion of evidence, which, if competent, related only to the amount of money due to the plaintiff, is made immaterial by the verdict. *Marcy v. Shelburne Falls & Colrain Street Railway*, 197.

New Trial.

Review by Rugg, C. J., of cases in which this court in ordering a new trial confined it to the specific issue affected by the error. *Simmons v. Fish*, 563.

As to a motion for a new trial on the question of damages only, on the ground that the damages awarded were inadequate, it was said, that only in exceptional and extremely rare instances will the inadequacy of damages not be so interwoven with liability that justice can be done without a new trial upon the whole case. *Ibid.*

Verdict of \$200 for the loss of an eye in an action of tort as to which it was said that in itself the verdict was almost a conclusive demonstration that it was the result of an improper compromise in regard to the vital principles which should have controlled the decision, and that setting it aside because it was inadequate and granting a new trial on the question of damages only would be an arbitrary exercise of discretion which would exceed the powers of the trial judge. *Ibid.*

An order purporting to grant a motion by a plaintiff in an action for personal injuries, that an inadequate verdict as to damages be set aside and that a

new trial be ordered on the question of damages only, is of no effect and does not set aside the verdict. *Simmons v. Fish*, 563.

The denial of a motion for a new trial asked for on the grounds that the verdict was against the evidence and that the verdict was against the law, which were based on questions open at the trial, is not subject to exception. *Lopes v. Connolly*, 487.

The denial of a motion for a new trial asked for on the ground that the verdict was against the weight of evidence is within the discretion of the trial judge and is not subject to exception. *Ibid.*

The denial of a motion for a new trial asked for on the ground that the damages returned by the jury were excessive is within the discretion of the trial judge and is not the subject of exception. *Ibid.*

Where a trial judge in denying a motion for a new trial, asked for on grounds that are wholly within his discretion, makes an order that he "in the exercise of his discretion overrules the motion," the fact that he files with the order a memorandum giving the reasons for his action has no effect upon the order, of which the memorandum is no part, being merely for the information of counsel. *Ibid.*

A motion for a new trial on the ground of newly discovered evidence is addressed to the discretion of the trial judge, which is a judicial and not an arbitrary discretion. *Powers v. Bergman*, 846.

Bill of exceptions which was held to contain nothing to show even unwise action of the trial judge in overruling such a motion. *Ibid.*

The requirement of Rule 41 of the Superior Court that, unless the court allows further time, the counsel for the party filing a motion for a new trial shall "cause a copy of the motion to be delivered to the adverse counsel on the day the same is filed," is complied with by depositing such notice in the mail on the day of the filing of the motion in accordance with the provisions of Rule 27 for serving a notice required by the rules. *Gloucester Mutual Fishing Ins. Co. v. Hall*, 332.

Where on an exception to an order granting a new trial the bill of exceptions does not show on what ground the new trial was granted, the exception cannot be sustained on the ground that the notice of the motion for the new trial was not given in accordance with the requirement of Rule 41, because the new trial may have been granted for some other cause than those mentioned in Rule 41. *Ibid.*

Variance.

Certain variance between different counts in an action of tort or contract and between the allegations of fact in the counts and the findings of fact which were warranted by the evidence were held to be immaterial. *Barry v. Woodbury*, 521.

It is not open to a defendant at the argument in this court of an exception by the plaintiff to a ruling that upon all the evidence introduced at the trial of a case the plaintiff could not recover, to contend that the verdict was ordered properly because there was a fatal variance between the cause of action alleged in the declaration and the evidence, no question upon the

Practice, Civil (*continued*).

pleadings having been raised by the ruling requested by the defendant on which the verdict was ordered. *Kellogg v. Boston & Maine Railroad*, 824.
 Variance between a declaration and an offer of proof made by the plaintiff's counsel in his opening address to the jury which under the circumstances was held not to prevent the sustaining of exceptions by the plaintiff to the ordering of a verdict for the defendant upon such offer of proof. *Ward v. Blouin*, 140.

Memorandum.

Where a trial judge in denying a motion for a new trial, asked for on grounds that are wholly within his discretion, makes an order that he "in the exercise of his discretion overrules the motion," the fact that he files with the order a memorandum giving the reasons for his action has no effect upon the order, of which the memorandum is no part, being merely for the information of counsel. *Lopes v. Connolly*, 487.

Exceptions.

Effect of pendency of exceptions.

Where, upon the sustaining of a demurrer in the Superior Court, the plaintiff alleges an exception, no judgment should be directed to be entered until the exception is overruled unless the exception is adjudged immaterial, frivolous or intended for delay. *Norton v. Lilley*, 214.

Insufficient bill.

An exception to a refusal of a presiding judge to rule at the close of a trial, that on all the evidence the plaintiff could not recover, cannot be sustained upon a bill of exceptions which does not purport to state all the material evidence. *Palatine Ins. Co. v. Kehoe*, 426.

Construction of bill.

Construction of certain language in a bill of exceptions with regard to what disposition a judge who heard the case without a jury made of certain requests for rulings. *John Hetherington & Sons, Ltd., v. William Firth Co.* 8.

Fact that a plaintiff's bill of exceptions states that the case was submitted to the jury by the judge shows that the judge made a ruling that it was proper so to do, which ruling may be construed by this court as showing that there was evidence warranting it. *Flaherty v. Boston & Northern Street Railway*, 821.

Findings for the plaintiff by a judge hearing a case without a jury where the defendant, after testifying in direct contradiction to the plaintiff's evidence, had asked the judge to find the facts in accordance with his testimony and on such facts to rule that the plaintiff cannot recover, necessarily implies that the judge did not believe the defendant's testimony and refused to make the finding and ruling asked for by him, and the defendant can have no ground for an exception. *Ingram v. Marston*, 327.

Scope of bill.

Where in an action at law a defendant's bill of exceptions shows that the only exceptions taken by him at the trial were to refusals of the presiding

judge to make certain rulings which he asked for, possible errors in the charge to the jury cannot be considered. *Ahern v. Boston Elevated Railway*, 506.

It is not open to a defendant at the argument in this court of an exception by the plaintiff to a ruling that upon all the evidence the plaintiff could not recover, to contend that the verdict was ordered properly because there was a fatal variance between the cause of action alleged in the declaration and the evidence, no question upon the pleadings having been raised by the ruling requested by the defendant on which the verdict was ordered. *Kellogg v. Boston & Maine Railroad*, 324.

Non-prejudicial error.

Exception of a plaintiff in an action of tort to an incorrect ruling of the judge before whom the case was tried without a jury will not be sustained if the findings of fact made by the judge on evidence warranting such findings establish conclusively that the defendant was without fault and was not liable to the plaintiff in any event. *Webber v. Old Colony Street Railway*, 432.

Erroneous refusal of a trial judge to order the jury to return a verdict for the defendant on a count of the declaration which contained no allegation of negligence on the part of the defendant was held not to entitle the defendant to have an exception thereto sustained where under the charge a verdict which was returned for the plaintiff must have included a finding of negligence on the part of the defendant. *Moore Spinning Co. v. Boston Ice Co.* 364.

An exception to a refusal by a trial judge to make a ruling correct upon the pleadings may be overruled upon the condition of the allowance of an amendment to the declaration supported by the evidence, if the case was submitted fairly to the jury on the question presented by the amendment. *Lemay v. Springfield Street Railway*, 68.

Immaterial exceptions.

In an action of contract, where the jury has returned a general verdict for the defendant, an exception by the plaintiff to the exclusion of evidence, which, if competent, related only to the amount of money due to the plaintiff, is made immaterial by the verdict. *Marcy v. Shelburne Falls & Colrain Street Railway*, 197.

Refusal of certain requests for rulings which were held not to warrant the sustaining of exceptions thereto because under the instructions given to the jury the rulings were inapplicable to the case. *Ahern v. Boston Elevated Railway*, 506.

Fact that there could not be both a recovery by the plaintiff in an action of deceit and upon a plea in recoupment of damages in a cross action upon a promissory note was held to render immaterial an exception by the defendant in the cross action to certain evidence on the question of fraud. *Townsend v. Niles*, 524.

An exception to the exclusion of a question asked of a witness in redirect examination was overruled because the exclusion was within the discre-

Practice, Civil (continued).

tionary power of the presiding judge, and also because from a subsequent question and answer the excepting party obtained in another form the evidence he had sought, and therefore was not harmed. *Garland v. Boston Elevated Railway*, 458.

Matters not subject to exception.

No exception lies to the refusal of a judge before whom an action at law is tried without a jury to make particular findings of fact. *O'Neill v. County of Worcester*, 374.

The denial of a motion for a new trial asked for on the ground that the verdict was against the weight of the evidence is within the discretion of the trial judge and is not subject to exception. *Lopes v. Connolly*, 487.

The denial of a motion for a new trial asked for on the ground that the damages returned by the jury were excessive is within the discretion of the trial judge and is not subject to exception. *Ibid.*

The denial of a motion asking for a new trial because the verdict was against the evidence and the verdict was against the law, which were grounds based on questions open at the trial, is not subject to exception. *Ibid.*

No exception lies to the refusal of the judge presiding at the trial of an action at law to make rulings upon requests presented before the introduction of any evidence. *Comstock v. Livingston*, 581.

Appeal.

As to the effect of an assumption of parties in the argument before the full court of an appeal from the denial of a motion to dismiss an action at law, regarding the record before the court, see *Johnson v. Carr*, 1.

Costs.

The word "costs" as applied to proceedings in court ordinarily means only legal or taxable costs and does not include counsel fees. *Burrage v. County of Bristol*, 299.

Entering Judgment.

Where, upon the sustaining of a demurrer in the Superior Court, the plaintiff alleges an exception, no judgment should be directed to be entered until the exception is overruled unless the exception is adjudged immaterial, frivolous or intended for delay. *Norton v. Lilley*, 214.

Motion to vacate Judgment.

Where, in an action which was dismissed under a general order of the Superior Court because nothing had been done therein within a year, it is shown by the records of that court that there had been proceedings in the action within the year next preceding the judgment of dismissal but it does not appear that there had been any clerical error in the entry of that judgment, this does not give the Superior Court jurisdiction to grant a motion to vacate the judgment where the motion was filed more than one year after the judgment was entered. *Karrick v. Wetmore*, 578.

A judgment of dismissal entered in due course in an action in the Superior Court, which was called and dismissed pursuant to a general order of that court to that effect applying to all cases in which no action has been taken within the year next preceding, is a final judgment within the meaning of R. L. c. 193, § 15, which requires that a petition to vacate a final judgment shall be filed within one year after the entry of such judgment. *Karrick v. Wetmore*, 578.

Rules of Court.

Rule 41. *Gloucester Mutual Fishing Ins. Co. v. Hall*, 332.

Rule 27. *Ibid.*

Disbarment Proceedings.

Attorneys charged by the Superior Court with the prosecution of disbarment proceedings may be awarded compensation by the court under R. L. c. 165, § 44. *Burrage v. County of Bristol*, 299.

PRACTICE, CRIMINAL.

Habeas Corpus.

Writ of *habeas corpus* will not be issued to take the place of an appeal, a bill of exceptions or a writ of error in a criminal case where the defendant has been tried by a court having jurisdiction of the crime charged and where the only question raised is in regard to the correctness of rulings made at the trial. *Flito's case*, 33.

Nor is such a proceeding the proper one to bring before this court the propriety of issuing a warrant upon a complaint without an examination of the complainant and his witnesses under oath as prescribed by R. L. c. 217, § 22. *Ibid.*

Motion for Particulars.

In a criminal case, the benefit of a motion for particulars is lost by a subsequent default of the defendant. *Commonwealth v. Drohan*, 445.

Motion to quash.

Benefit of a motion to quash a criminal complaint is lost by a subsequent default of the defendant. *Commonwealth v. Drohan*, 445.

Where a complaint was filed in a police, district or municipal court and, from a sentence there imposed, the defendant has appealed to the Superior Court, it is too late after the case has been entered in the Superior Court to file a motion to quash the complaint for insufficiency in matter of form. *Ibid.*

Default.

By suffering a default, a defendant in a criminal case pending in the Superior Court on appeal from a police, district or municipal court waives the benefit of motions, previously filed by him, for particulars and to quash the complaint. *Commonwealth v. Drohan*, 445.

Practice, Criminal (*continued*).

A motion to remove a default in a criminal case pending in the Superior Court on appeal from a police, district or municipal court is addressed to the discretion of the presiding judge, and a denial of the motion will not be reviewed on appeal to this court. *Commonwealth v. Drohan*, 445.

Conduct of Trial.

Where at the trial of a criminal case the defendant makes an offer of proof, containing various matters which are clearly too remote to be admissible, the presiding judge properly may exclude the evidence, thus offered as a whole, without separating it into parts and passing upon the admissibility of each part separately. *Commonwealth v. Shookshanian*, 128.

Discretionary power of a judge presiding at the trial of a criminal complaint in determining as to the qualification of a witness offered as an expert. *Commonwealth v. Phelps*, 109.

Discretionary power of a judge presiding at a trial of a criminal complaint with regard to the cross-examining of witnesses for the Commonwealth on collateral matters in order to show hostility or bias. *Ibid*.

Sentence.

Under R. L. c. 8, § 4, cl. 2, if at the time of the commission of a certain crime and of the commencement of proceedings in a police, district or municipal court for the punishment thereof, such court has jurisdiction thereof, and before sentence is imposed a statute is passed repealing the statute granting such jurisdiction, a valid sentence nevertheless may be imposed in the proceedings originally begun. *Commonwealth v. Drohan*, 445.

Stay of Execution of Sentence.

Under R. L. c. 220, § 3, the determination of the question, whether or not the execution of a sentence imposed by the Superior Court upon one convicted of a crime not punishable by death shall be stayed after an appeal is discretionary with that court. *Commonwealth v. Drohan*, 445.

Arrest of Judgment.

Where a complaint was filed in a police, district or municipal court and, from a sentence there imposed, the defendant has appealed to the Superior Court and has filed therein motions to quash the complaint and for particulars, and upon the calling of the case for trial has defaulted, a motion thereafter filed by him for an arrest of judgment should be denied. *Commonwealth v. Drohan*, 445.

Appeal.

Under R. L. c. 219, § 32, an appeal by the defendant in a criminal case from an order of the Superior Court imposing a sentence raises only the question whether any error of law is apparent upon the record. *Commonwealth v. Phelps*, 360.

Where a complaint was filed in a police, district or municipal court and, from a sentence there imposed, the defendant has appealed to the Superior

Court, it is too late after the case has been entered in the Superior Court to file a motion to quash the complaint for insufficiency in matter of form. *Commonwealth v. Drohan*, 445.

PRESCRIPTION.

Public right of way across railroad tracks which was held not to have been acquired by prescription before the enactment of St. 1892, c. 275. *Dahlgren v. Boston & Maine Railroad*, 243.

PROBATE COURT.

Guardian's Accounts.

A guardian was held not to be entitled to set up at hearings upon the allowance of his accounts, as an adjudication of the propriety of certain overpayments made by him to a caretaker of his ward, a judgment entered by consent in a certain action brought by the caretaker against the ward in her lifetime and continued against the administrator of her estate after her death. *Harding v. Forbush*, 460.

Decrees.

Decrees of the Probate Court confirming certain accounts of trustees in which certain items were treated as capital were held to bar a contention by one, who had succeeded to the interest of certain beneficiaries who had assented to the accounts, that the items should have been treated as income. *Southard v. Southard*, 847.

A decree of the Probate Court under R. L. c. 144, appointing a receiver of the property of a person adjudged an absentee was held not to show necessarily that such a person was a non-resident of the Commonwealth within the provisions of R. L. c. 170, § 5. *Johnson v. Carr*, 1.

RAILROAD.

Exercise of Right of Eminent Domain.

Principle upon which damages are assessed for the taking of land by right of eminent domain by a railroad corporation. *Boston & Maine Railroad v. Hunt*, 128.

Application of such principle to a case of a taking of a meadow with a brook running through it, which was held to include the right of flowage for all purposes. *Ibid*.

Public Right of Way over Tracks.

No right of way across the tracks of a railroad can have been acquired by the public by the use of a path which had existed only for ten years previous to the enactment of St. 1892, c. 275, prohibiting the acquisition by prescription of a right of way across any railroad track or location in use for railroad purposes. *Dahlgren v. Boston & Maine Railroad*, 243.

No public right of way by prescription across the tracks of a railroad can be established by tacking to a period of ten years before the enactment of St. 1892, c. 275, during which the public had used a certain path across such

Railroad (*continued*).

tracks, a previous period during which a distinctly different path or road starting from a point more than eighty feet distant had been used to cross the tracks. *Dahlgren v. Boston & Maine Railroad*, 243.

Regulations.

Passenger, who was arrested unlawfully upon a railroad train and was taken from the train through the streets of a town by employees of the railroad corporation because he refused to comply with a reasonable rule or regulation of the corporation operating the railroad, was allowed to recover from the corporation as for a trespass *ab initio*. *Hull v. Boston & Maine Railroad*, 159.

Conspicuous painting on the door of a railroad car of a regulation forbidding passengers from riding on the platform or steps of any car, in the absence of evidence to show that the regulation was called to the attention of one who was killed while riding there and that he chose to disregard it, was held, in an action to recover for such death, not to be evidence tending to show that the plaintiff's intestate had ceased to be a passenger of the defendant. *Renaud v. New York, New Haven, & Hartford Railroad*, 553.

In such action evidence of such a notice was held to be admissible without proof that the decedent knew of it, on the question, whether any of the employees of the defendant who knew of and relied on the posting of the notice, had been guilty of gross negligence. *Ibid*.

Failure to give Signals.

St. 1906, c. 463, Part II, establishing liability on the part of a railroad corporation where the death of a traveller on a highway is caused by a failure to give the signals required by § 147, is applicable only where the death is caused by a locomotive or a locomotive with a car or cars attached to it. *Rodrigues v. New York, New Haven, & Hartford Railroad*, 305.

At the trial of an action against a railroad corporation for injuries received at a railroad crossing at which the plaintiff was struck by a train on which no bell was rung or whistle blown, evidence as to the conduct of the plaintiff as he approached the crossing was held not as matter of law to sustain the burden, which was on the defendant, of showing that the plaintiff was guilty of gross or wilful negligence. *Engleman v. Boston & Maine Railroad*, 179.

Liability for Fire.

The common law liability of a railroad corporation for damage to property due to sparks negligently allowed to escape from its locomotive engines while in use upon its road was abolished by St. 1840, c. 85, the broader remedy given by that statute, and by the succeeding statutes re-enacting its provisions, for injuries to property by fire communicated by locomotive engines being exclusive. *New England Box Co. v. New York Central & Hudson River Railroad*, 465.

Report of the detective department of the district police was held inadmissible in an action against a railroad corporation by one whose goods had been injured by fire while they were in the possession of the defendant as

a carrier. *P. Garvan, Inc., v. New York Central & Hudson River Railroad*, 275.

Where goods are transported by a railroad corporation to one of its stations, at which the rule for the delivery of goods requires that the consignee shall be notified of their arrival, and the car containing the goods is left standing on a side track in the corporation's freight yard, where, before any notice has been given to the consignee of the arrival of the goods, they are injured by fire while still in the car, the corporation has not become a mere warehouseman and its liability for the injury is that of carrier of the goods. *Ibid.*

Repair of Bridges over Highways.

Under floor of a bridge over tracks of a railroad was held to be part of the "framework" of the bridge and not of its "surface," within the meaning of those words as used in St. 1906, c. 463, Part I, § 88, and the municipality was held bound to keep it in repair. *Selectmen of Natick v. Boston & Albany Railroad*, 229.

Maintenance of Fences.

A railroad corporation is under no obligation either at common law or by statute to erect or maintain a fence or barrier between its freight yard and an adjoining public way. *Khinoveck v. Boston & Maine Railroad*, 170.

Maintenance of Stations.

Statement and application of the requirements of the law with regard to the providing and maintaining of suitable station platforms by railroad corporations. *Savageau v. Boston & Maine Railroad*, 164.

Liability to Passengers.

Actions against railroad corporations for personal injuries or death of passengers and others, see NEGLIGENCE, Railroad.

RELEASE.

Because the plaintiff in an action at law in which the defendant has set up a release can prove that the release was obtained by fraud without filing a replication to that effect, a judge of the Superior Court has power to strike such a replication from the records. *Comstock v. Livingston*, 581.

Testimony of the plaintiff at the trial of an action by a customer against a stockbroker for breach of contracts to purchase and sell securities for the plaintiff, which was held to have been material on the question whether certain releases relied on by the defendant were procured from the plaintiff by fraud. *Greene v. Corey*, 536.

Evidence which was held to be sufficient to show that the releases were so procured. *Ibid.*

Acceptance by sisters of legacies given to them in the will of their father, and releases given by them to their brother as executor of the father's will, were held not to prevent the sisters from maintaining actions against

Release (continued).

their brother for a sum promised to them by him if they would withdraw appeals from an allowance of the will by the Probate Court. *Silver v. Graves*, 26.

REPLEVIN.

Replevin of a wagon against a deputy sheriff who had attached it in a suit against a partnership, which was maintained because, although the partnership had taken possession of the wagon directly from one who sold it to them, the plaintiff before the attachment had taken possession of it under an agreement with the partnership pledging it as security for the purchase money which he had advanced. *Garnson v. Pritchard*, 296.

RES INTER ALIOS.

See that subtitle under EVIDENCE.

RES IPSA LOQUITUR.

See that subtitle under NEGLIGENCE.

RES JUDICATA.

Decrees of the Probate Court confirming certain accounts of trustees in which certain items were treated as capital were held to bar a contention by one who had succeeded to the interest of certain beneficiaries who had assented to the accounts, that the items should have been treated as income. *Southard v. Southard*, 347.

A guardian was held not to be entitled to set up, at hearings upon the allowance of his accounts, as an adjudication of the propriety of certain overpayments made by him to a caretaker of his ward, a judgment entered by consent in a certain action brought by the caretaker against the ward in her lifetime and continued against the administrator of her estate after her death. *Harding v. Forbush*, 460.

A decree, dismissing a petition by a wife for separate maintenance because of condonation by the wife of cruelty on the part of the husband which she had alleged as the ground for her petition, is not conclusive proof of ratification by her of a deed which she had given under duress by him and for his benefit at the time of the acts of cruelty alleged in the petition, and does not bar a suit in equity by her to have the deed set aside. *Hoag v. Hoag*, 94.

RESTRAINT UPON ALIENATION.

It was held in a suit in equity by trustees for instructions, that a trust under a will, whose termination was postponed until the payment and discharge of mortgages originally upon real estate included in it and also of such mortgages as the trustees at any time subsequently in their discretion might place thereon, should be terminated because it rendered the property inalienable for an unreasonably long period. *Southard v. Southard*, 347.

RESTRICTIONS.

EQUITABLE RESTRICTIONS, see that title.

REVIEW, WRIT OF.

A petition for a writ of review of a judgment of the Superior Court, which was discontinued by the petitioner by leave of court without costs before any trial was had upon it, does not estop the petitioner from maintaining a petition for a writ of error to reverse the same judgment upon substantially the same grounds as those alleged in his petition for a writ of review. *Karrick v. Wetmore*, 578.

RULES OF COURT.

Rule 41. *Gloucester Mutual Fishing Ins. Co. v. Hall*, 832.

Rule 27. *Ibid.*

SALE.

Validity.

A sale of "blended maple sugar," which is a well known article in the trade in which the parties to the sale are engaged, consisting in part of maple sugar and in part of granulated sugar and having been ordered as such a mixture, is not a sale of adulterated food or of an imitation within the meaning of R. L. c. 75, §§ 16-18. *Adams v. New England Maple Syrup Co.* 475.

Sale of such sugar in unmarked packages which was valid. *Ibid.*

Construction of Contract.

Contract between an English manufacturer and a Boston merchant as to the sale of the manufacturer's goods by the merchant, which was held to have a double aspect, in one aspect contemplating the relation of principal and agent and in another that of vendor and vendee. *John Hetherington & Sons, Ltd., v. William Firth Co.* 8.

Construction of a contract by a manufacturer to supply to a customer all the bottles he might need during a certain period, where the customer was to give advance notice of his requirements. *Carrick v. Liquezone Co.* 594.

Delivery.

Where goods are sold by sample at the buyer's place of business and the seller ships the goods by railroad consigned to the buyer who has given no directions for transportation, the seller paying the freight charges, the title to the goods remains in the seller until they have been delivered by the carrier to the buyer and have been accepted by him, and, if the goods are injured by fire while in the hands of the carrier, the right of action for such injury is in the seller. *P. Garvan, Inc., v. New York Central & Hudson River Railroad*, 275.

Rescission.

Action on an account annexed for the value of property delivered to the defendant under a contract of barter or exchange which the defendant abandoned after part performance, cannot be maintained if the plaintiff has received and retained a part of the property which was to be delivered to him under the contract. In order to rescind the contract and sue on a *quantum valebat* the plaintiff first must put the defendant in the condition in which he was before the bargain. *Owen v. Button*, 219.

Execution Sale.

See that subtitle under EXECUTION.

SHIP.

Action by an employee of a railroad corporation against such corporation for personal injuries received by the falling of a part of the hatch combing while the plaintiff and others of the defendant's employees were unloading the ship. *O'Malley v. New York, New Haven, & Hartford Railroad*, 344.

SNOW AND ICE.

No action can be maintained under St. 1909, c. 514, § 127, by an employee against his employer for personal injuries alleged to have been caused by the unsafe condition of the defendant's premises by reason of accumulations of snow or ice without proving that the notice required by St. 1908, c. 305, was given to the defendant within ten days after the injury. *Paszowski v. Stony Brook Paper Co.* 86.

STABLE.

Suit in equity under R. L. c. 102, § 71, to restrain the erection, occupation or use of a building for a stable in a city whose population exceeds twenty-five thousand without a license from the board of health. *Worcester Board of Health v. Tupper*, 378.

STATUTE.

Construction.

Where the language of a statute is of doubtful import, a construction put upon it for many years, during which the statute was not amended, by officers charged under its provisions with the performance of public duties is strong evidence of its meaning. *Burrage v. County of Bristol*, 299.

The rule of law, which under proper conditions allows the admission of extrinsic evidence to explain the technical or peculiar meaning of a word as used in an instrument in writing, never has been applied to the interpretation of the language of a statute. *Selectmen of Natick v. Boston & Albany Railroad*, 229.

St. 1909, c. 490, Part II, § 46, relating to the appointment of an agent and the registering of identifying information regarding him by a non-resident purchaser of a tax title is remedial and should be liberally construed. *Davidson v. Stafford*, 145.

The rule, that a claim for land damages is not a debt within the meaning of our tax statutes until it becomes fixed and receivable, having been established by the decisions of this court during a period of forty years, and, although many changes have been made in the laws relating to taxation, the phrase "other debts due the persons to be taxed more than they are indebted or pay interest for," as used in Gen. Sts. c. 11, § 4, having remained and being found in substance in St. 1909, c. 490, Part I, § 4, cl. 2, it must be held that, in using the word "debts" in this phrase in the various codifications in the same connection as before, the Legislature adopted the interpretation given to it by the decisions of this court as not including such unliquidated claims for damages. *Powers v. Worcester*, 471.

Repeal.

Under R. L. c. 8, § 4, cl. 2, if, at the time of the commission of a certain crime and of the commencement of proceedings in a police, district or municipal court for the punishment thereof, such court has jurisdiction thereof and before sentence is imposed a statute is passed repealing the statute granting such jurisdiction, a valid sentence nevertheless may be imposed in the proceedings originally begun. *Commonwealth v. Drohan*, 445.

STATUTE OF FRAUDS.

See FRAUDS, STATUTE OF.

STATUTE OF LIMITATIONS.

See LIMITATIONS, STATUTE OF.

STATUTES CITED AND EXPOUNDED.

See page 719.

STOCKBROKER.

In an action of contract against a stockbroker by a customer, for a failure of the defendant to fulfil orders to buy and sell stocks for the plaintiff upon margin, after the plaintiff had proved payments to and acceptance by the defendant of sums of money for the purpose alleged, the burden was on the defendant to show that the money had been used in the manner authorized by the agreement with the plaintiff. *Greene v. Corey*, 536.

In an action against a stockbroker by a customer for margins paid under an agreement by the stockbroker to purchase shares of stock in accordance with the customer's orders, the stockbroker, to prove that he carried out the orders through a correspondent upon an exchange where the shares were

Stockbroker (*continued*).

dealt in, must prove that the correspondent had under his control, free from the just demands of other customers and available for delivery to the plaintiff, the shares of stock of which upon payment the plaintiff was entitled to demand delivery. Following *Fiske v. Doucette*, 206 Mass. 275. *Greene v. Corey*, 536.

And in such an action it is not a sufficient defense for the defendant to prove merely that in good faith he transmitted the plaintiff's orders to reputable correspondents upon the stock exchange of a city where they could be carried out and paid the demanded price for their due execution and obtained valid contractual obligations with such correspondents. *Ibid.*

In an action of contract against a stockbroker by a customer where the declaration contained a count for breach of contracts for the purchase and sale on margin of shares of stock by the defendant for the plaintiff and a count for money had and received by the defendant to the plaintiff's use, and it appeared that the plaintiff had paid money to the defendant at various times, it was held that it could not be ruled that, if the parties had a different idea of their contractual relations, their minds never met and there never was any contract between them, because if the minds of the parties did not meet and there was no agreement between them, the defendant was not justified at all in using the plaintiff's money and must account to him for it. *Ibid.*

Testimony of the plaintiff at the trial of such an action, which was held to have been material on the question whether certain releases relied on by the defendant were procured from the plaintiff by fraud. *Ibid.*

Evidence which was held to be sufficient to show that the releases were so procured. *Ibid.*

STREET RAILWAY.

One who is within a station used by a corporation operating both a surface and an elevated railway and is passing from one car to another is a passenger of the corporation. *Kelley v. Boston Elevated Railway*, 454.

In an action against a street railway company for the conscious suffering and death of the plaintiff's intestate alleged to have been caused by an assault committed upon him by a conductor after he had refused to comply with a regulation of the defendant prohibiting passengers from riding in a vestibule of a car, evidence tending to show a custom of the defendant to permit passengers to ride in vestibules was excluded rightly. *Liversidge v. Berkshire Street Railway*, 234.

Proper disposition by the trial judge of requests for rulings as to the rights of the passenger in such a case. *Ibid.*

A police officer, charged with the regulation of traffic in a city at a crossing of streets where street cars and other vehicles pass, in order faithfully to perform his whole duty, may find himself compelled to get upon the step of a car where he may be exposed to injury and where passengers

are not invited or expected to stand. *Ahern v. Boston Elevated Railway*, 506.

Actions against street railway companies for personal injuries to passengers and others, see NEGLIGENCE, *Street Railway*.

STRIKE.

Lawful strike undertaken by lasters in a shoe factory in good faith to prevent the proprietor of the factory from permitting a laster in his employ to employ and pay a helper, for whose work the laster is paid by the proprietor in addition to being paid for his own work. *Minasian v. Osborne*, 250.

SUBROGATION.

By St. 1895, c. 293, insurance companies, which have paid losses on property caused by fires communicated by the locomotive engines of a railroad corporation, have no right of subrogation to the remedy of the insured against the railroad corporation under the statute creating the liability of a railroad corporation for such fires. *New England Box Co. v. New York Central & Hudson River Railroad*, 465.

SUNDAY.

See LORD'S DAY.

SUPERIOR COURT.

Attorneys charged by the Superior Court with the prosecution of disbarment proceedings may be awarded compensation by the court under R. L. c. 165, § 44. *Burrage v. County of Bristol*, 299.

St. 1910, c. 555, § 3, repealing the provision of R. L. c. 157, § 8, requiring capital cases to be tried before more than one judge of the Superior Court, is not unconstitutional. *Commonwealth v. Phelps*, 78.

Motion for continuance of a case in order for hearing on a demurrer in the Superior Court, properly was denied because it substantially was based on allegations that all the judges of that court were in a conspiracy to treat the plaintiff in a hostile manner. *Norton v. Lilley*, 214.

Power of the Superior Court as to the setting aside of a verdict for the plaintiff because of inadequacy of damages and the granting of a new trial on the question of damages only. *Simmons v. Fish*, 568.

An order purporting to grant a motion by a plaintiff, in an action for personal injuries, that an inadequate verdict as to damages be set aside and that a new trial be ordered on the question of damages only, is of no effect and does not set aside the verdict. *Ibid*.

Where, in an action which was dismissed under a general order of the Superior Court because nothing had been done within a year, it is shown by the records of that court that there had been proceedings in the action within the year next preceding the judgment of dismissal but it does not appear that there had been any clerical error in the entry of that judg-

Superior Court (*continued*).

ment, this does not give the Superior Court jurisdiction to grant a motion to vacate the judgment where the motion was filed more than one year after the judgment was entered. *Karrick v. Wetmore*, 578.

SUPREME JUDICIAL COURT.

As to the effect of an assumption of parties in argument before the full court regarding the record which was before the Superior Court upon the hearing of a motion to dismiss, see *Johnson v. Carr*, 1.

SURETY.

Evidence in an action of contract which was held sufficient to warrant the submission to a jury of questions whether the defendant had agreed to indemnify the plaintiff for any loss he might sustain if he should become one of two sureties upon a bail bond, and whether such agreement was several or was joint. *Cleveland v. Peirce*, 496.

Action by the owner of certain land against a building contractor and a surety upon a bond guaranteeing the performance by the contractor of a contract for the erection of a building upon the land, in which the contract was construed and it was held that certain payments of money and the giving of a certain note by the owner to the contractor were not in violation of the contract and did not release the surety from liability. *Borucinski v. Hampden Real Estate Trust*, 99.

TAKING.

See EMINENT DOMAIN.

TAX.

Assessment.

A claim for damages for real estate taken for highway purposes under a statute providing for the abolition of certain grade crossings, to recover which a petition for an assessment by a jury is pending, is not taxable as a debt under St. 1909, c. 490, Part I, § 4, cl. 2, providing for the taxation of "other debts due the person to be taxed more than he is indebted or pays interest for." *Powers v. Worcester*, 471.

Sewer Assessment.

Petition for the revision of a sewer assessment which was granted because, while the principle adopted in making the assessment was correct in the abstract, as applied to the petitioner's land it produced an assessment largely in excess of the benefit. *Driscoll v. Northbridge*, 151.

Betterment.

The rules by which the benefit conferred upon land by a public improvement is to be ascertained, when that question arises for settlement as a matter of fact, are the same as those by which land values are determined in any

other connection, the inquiry being, how much has the particular public improvement added to the fair market value of the property, as between a willing seller and a willing buyer, with reference to all the uses to which it reasonably is adapted and for which it plainly is available, prospective as well as present, by strangers as well as by the owner. *Driscoll v. Northbridge*, 151.

Petition for the revision of a sewer assessment which was granted because, while the principle adopted in making the assessment was correct in the abstract, as applied to the petitioner's land it produced an assessment largely in excess of the benefit. *Ibid*.

Exemption.

A corporation called the Young Men's Christian Association of Newburyport was held to be a benevolent or charitable institution within the meaning of those words in St. 1909, c. 490, Part I, § 5, cl. 3, exempting the property of such an institution from taxation, the fact that some of its benefits were afforded only to its members, and a limitation of the privileges of becoming "active" members, of voting and of holding office not being material. *Little v. Newburyport*, 414.

A fund, bequeathed to trustees for the purpose of paying the net income thereof "for the general purposes" of a Young Men's Christian Association which is a benevolent or charitable institution, is exempt from taxation under the provisions of St. 1909, c. 490, Part I, § 5, cl. 3. *Ibid*.

Abatement.

Upon an appeal from a refusal of the assessors of a city to abate a tax, where it appears that the tax was assessed wrongfully upon a pending unliquidated claim of the petitioner for land damages, which was not taxable as a debt under St. 1909, c. 490, Part I, § 4, cl. 2, the fact that the petitioner under protest had included the claim, when its amount had been fixed by a settlement, in a list filed by him on the May 18 after the April 1 as of which the tax was assessed, does not estop him from claiming an abatement, the rights of the parties being determined by the situation of affairs on April 1. *Powers v. Worcester*, 471.

Redemption.

In a suit in equity by the owner of land against a non-resident who had purchased it at a tax sale, it was held that, although a formal tender was made more than two years, and the suit was brought more than three years after the sale, since the defendant had not complied with the requirements of R. L. c. 12, § 45, as to appointing an agent and recording identifying information regarding him, the court should consider whether all the circumstances were such as to make it equitable that the plaintiff should be allowed to redeem. *Davidson v. Stafford*, 145.

Owner of land which, while it stood in the name of another for him, was sold at a tax sale to a non-resident who failed to comply with the requirements of R. L. c. 12, § 45, as to the appointment of an agent and the

Tax (*continued*).

registering of identifying information regarding him, after he has taken the record title in himself more than two years after the sale, is the proper person to bring a suit in equity for redemption from the tax title. *Davidson v. Stafford*, 145.

Non-resident Holder of Tax Title.

St. 1909, c. 490, Part II, § 46, relating to the appointment of an agent and the registering of identifying information regarding him by a non-resident purchaser of a tax title, is remedial and should be liberally construed. *Davidson v. Stafford*, 145.

Application of that statute, so construed, in a suit in equity for redemption against such non-resident holder of a tax title. *Ibid*.

Avoidance.

Certain acts of a guardian committed for the purpose of avoiding an increase of taxation of the ward's estate, no loss to the estate resulting, although they were stated to be a breach of duty owed by the guardian to the public and as such were to be condemned, were held to furnish no reason for denying to the guardian such compensation as he had earned for his other services to the estate of the ward. *Harding v. Forbush*, 460.

TOWNS.

See MUNICIPAL CORPORATIONS.

TRESPASS.

Passenger, who was arrested unlawfully upon a railroad train and was taken from the train through the streets of a town by employees of the railroad corporation because he refused to comply with a reasonable rule or regulation of the corporation operating the railroad, was allowed to recover from the corporation as for a trespass *ab initio*. *Hull v. Boston & Maine Railroad*, 159.

Action against a railroad corporation for injuries received by a girl who had passed from a passageway adjoining the defendant's freight yard to a track in the yard, where she was run over, which could not be maintained because the plaintiff was a trespasser when injured. *Khinoveck v. Boston & Maine Railroad*, 170.

Where the owner of certain land which was subject to a second mortgage gave to a street railroad company permission to erect poles on the land and to string wires across it, the second mortgagee after he has acquired title to the land by foreclosure of his mortgage and has made a demand of the company that it remove its poles and wires and the company has refused to comply therewith, may maintain an action of tort in the nature of trespass *quare clausum fregit*. *Phelps v. Berkshire Street Railway*, 49.

In such an action, the character of the defendant's structures and of its acts in sending a dangerous current of electricity over the plaintiff's land are proper matters for consideration by the jury in the assessment of damages. *Ibid*.

Interference by a court of equity to prevent the continuance of repeated trespasses to real estate under a claim of an adverse right persistently asserted, where the wrongful acts separately may not have impaired materially the use and enjoyment of the property affected. *Boston & Maine Railroad v. Hunt*, 128.

TRUST.

What constitutes.

A will, which included a bequest to a trustee for the benefit of a sister of the testator and in a residuary clause made a division among the "legatees" previously mentioned, was construed to mean that the sister should not receive a share of the residue absolutely, but that what represented her share should go to the trustee for her benefit. *Worcester Trust Co. v. Turner*, 115.

For Charitable Purposes.

A fund, bequeathed to trustees for the purpose of paying the net income thereof "for the general purposes" of a Young Men's Christian Association which is a benevolent or charitable institution, is exempt from taxation under the provisions of St. 1909, c. 490, Part I, § 5, cl. 3. *Little v. Newburyport*, 414.

Resulting.

Suit in equity by a member of a partnership to compel the conveyance to the partners of a certain parcel of real estate, which had been conveyed to one of the defendants without consideration by the mother of the partners, in which it was held that the facts showed a resulting trust for the benefit of the partnership and that the plaintiff was entitled to relief. *Davis v. Downer*, 573.

Construction.

Devise of interest in certain real estate in trust for children and grandchildren of testator until certain mortgages were paid, which, it was held, vested in interest at the death of the testator and was to vest in possession at the termination of the trust by the payment of the mortgages. *Southard v. Southard*, 347.

Restraint upon Alienation.

It was held in a suit in equity by trustees for instructions, that a trust under a will whose termination was postponed until the payment and discharge of mortgages originally upon the real estate included in it and also of such mortgages as the trustees at any time subsequently in their discretion might place thereon, should be terminated because it rendered the property inalienable for an unreasonably long period. *Southard v. Southard*, 347.

Purchase of Trust Property by Trustee.

Where by the provisions of a will certain real estate was given in trust to two sisters to pay to themselves the net income thereof for their comfort-

Trust (*continued*).

able maintenance, with a power, in case either of them by reason of misfortune should need more than the net income, to sell the property at public or private sale, and one of the sisters comes to need more than her share of the net income, the other sister, if she pays an adequate price therefor, may purchase the needy sister's interest in a part of the trust property without violating the equitable rule forbidding one who holds property in a fiduciary capacity from becoming a purchaser thereof. *Coates v. Lunt*, 314.

Fraudulent Trustees.

Where a person, who is sole trustee of two separate estates, pays certain taxes due from one of the estates with money embezzled by him from the other estate, a new trustee of the estate from which the money was embezzled may maintain a suit in equity to recover its amount from a new trustee of the estate which was so unjustly enriched by having its debts for taxes thus discharged with the money of the plaintiff. *Bremer v. Williams* 256.

In such a suit, where the defendant sets up the statute of limitations, the period, during which the dishonest person was the trustee of both estates before his dishonesty was discovered, is to be deducted from the six year period of limitations, which begins to run only when there is some one by whom and a different person against whom the claim can be enforced. *Ibid.*

Accounts of Trustee: Capital and Income.

Decrees of the Probate Court confirming accounts of trustees in which certain items were treated as capital were held to bar a contention by one who had succeeded to the interest of beneficiaries who had assented to the accounts that the items should have been treated as income. *Southard v. Southard*, 347.

Termination.

It was held in a suit in equity by trustees for instructions that a trust under a will whose termination was postponed until the payment and discharge of mortgages originally upon real estate included in it and also of such mortgages as the trustees at any time subsequently in their discretion might place thereon, should be terminated because it rendered the property inalienable for an unreasonably long period. *Southard v. Southard*, 347.

Liability of Beneficiary for Tort.

In an action against one alleged to be the owner of certain real estate for personal injuries due to a defective condition of the land at its junction with a public sidewalk, it was held that, if the title to the real estate was in another under an oral agreement for the defendant's benefit, there could be no recovery unless the defendant was in occupation of the land or had undertaken its management and control. *Curry v. Dorr*, 430.

UNJUST ENRICHMENT.

Where a person, who is sole trustee of two separate estates, pays certain taxes due from one of the estates with money embezzled by him from the other estate, a new trustee of the estate from which the money was embezzled may maintain a suit in equity to recover its amount from a new trustee of the estate which was so unjustly enriched. *Bremer v. Williams*, 256. In such a suit, where the defendant sets up the statute of limitations, the period, during which the dishonest person was the trustee of both estates before his dishonesty was discovered, is to be deducted from the six year period of limitations, which begins to run only when there is some one by whom and a different person against whom the claim can be enforced. *Ibid*.

UNLAWFUL INTERFERENCE.

One, who serves on the employer of a workman a notice of a supposed assignment of wages by the workman, which in fact was made by a different person of the same name, and on being informed by the workman of the mistake unjustifiably refuses to withdraw the notice and thereby causes the workman's discharge, is liable to the workman in an action of tort for the damages resulting from this unlawful interference with his employment. *Lopes v. Connolly*, 487.

USAGE.

Where the language of a statute is of doubtful import, a construction put upon it for many years, during which the statute was not amended, by officers charged under its provisions with the performance of public duties is strong evidence of its meaning. *Burrage v. County of Bristol*, 299. See also CUSTOM.

VENUE.

See that subtitle under PRACTICE, CIVIL.

VERDICT.

See that subtitle under PRACTICE, CIVIL.

WAIVER.

In an action by a landlord against a tenant at will for rent, if the defendant relies upon an alleged waiver by the plaintiff of the requirement of a notice under R. L. c. 129, § 12, the burden of proving such a waiver is on the defendant. *Leavitt v. Maykel*, 55. Facts which were held not to amount to such a waiver as matter of law. *Ibid*.

WATER RIGHTS.

Principle upon which damages are assessed for the taking of land and water rights by a railroad corporation by right of eminent domain. *Boston & Maine Railroad v. Hunt*, 128.

Water Rights (*continued*).

Application of such principle to a case of a taking of a meadow with a brook running through it, which was held to include the right of flowage for all purposes. *Boston & Maine Railroad v. Hunt*, 128.

WAY.

Private.

A right of way, created by an express reservation in a deed of land as appurtenant to a back lot, to pass through a front lot to a public street, cannot be used lawfully by a tenant of the owner of the back lot occupying land beyond that lot. *Randall v. Grant*, 302.

A right of way, created by an express reservation in a deed of land as appurtenant to a back lot, to pass through a front lot to a public street in a village, may be used by the teamsters of a contractor, to whom the owner of the back lot has sold gravel and sand to be taken from a sand pit on such lot, to cart such gravel and sand to the street, although when the deed containing the reservation of the way was made the back lot was used for garden and grass land and no sand pit had been opened on it. *Ibid.*

Private right of way which was held to pass by a will as appurtenant to a homestead and a garden connected therewith, and not to be restricted to use for domestic purposes, but to be left to be adapted to the convenience and desires of occupants of the estate from time to time, so that it might be used in connection with a theatre erected where the garden had been. *Gorton-Pew Fisheries Co. v. Tolman*, 402.

Action by a girl against the landlord of a tenement in which she lived with her father, for personal injuries caused by a defect in a plank walk at the side of a passageway leading from the tenement to a highway, in which the questions of the plaintiff's due care and of the defendant's negligence were held to be for the jury. *Callahan v. Dixon*, 510.

Public.

No right of way across the tracks of a railroad can have been acquired by the public by the use of a path which has existed only for ten years previous to the enactment of St. 1892, c. 275, prohibiting the acquisition by prescription of a right of way across any railroad track or location in use for railroad purposes. *Dahlgren v. Boston & Maine Railroad*, 243.

No public right by prescription across the tracks of a railroad can be established by tacking to a period of ten years before the enactment of St. 1892, c. 275, a further period during which a distinctly different path or road starting from a point more than eighty feet distant had been used to cross the tracks. *Ibid.*

WILL.

A plain gift in a will will not be modified by uncertain language of a codicil to any greater extent than such language expressly requires. *Lovering v. Balch*, 105.

For further decisions as to the construction of wills, see DEVISE AND LEGACY.

WITNESS.

Cross-examination.

Discretionary power of a judge presiding at a trial of a criminal complaint with regard to the cross-examining of witnesses for the Commonwealth on collateral matters in order to show hostility or bias. *Commonwealth v. Phelps*, 109.

Redirect Examination.

At the trial of an action against a street railway corporation for personal injuries received by a laborer upon a highway, a statement signed for the defendant by one of its witnesses was improperly admitted in evidence in redirect examination after the plaintiff had inquired regarding the statement in cross-examination. *Flaherty v. Boston & Northern Street Railway*, 321.

Exclusion of questions asked in the redirect examination of a witness is within the discretionary power of the presiding judge. *Garland v. Boston Elevated Railway*, 458.

Impeachment.

In an action of deceit by an insurance company against one who was alleged to have procured fraudulently from the plaintiff payment of a loss alleged to have been sustained under a policy of fire insurance, the plaintiff, to impeach testimony of the defendant and of her husband, properly was permitted to introduce evidence of statements made to a deputy chief of the district police upon an official inquiry to investigate the fire. *Palatine Ins. Co. v. Kehoe*, 426.

Certain documents which were held not to be competent evidence to contradict witnesses who had testified for the Commonwealth in a prosecution for violation of R. L. c. 56, §§ 57, 58, regulating the sale of milk. *Commonwealth v. Phelps*, 109.

Absent Witness.

Ruling, requested as to a comment in argument of the counsel for the plaintiff upon the absence of witnesses to testify to matters material to the defendant's case, was held rightly to have been refused. *Kean v. New York Central & Hudson River Railroad*, 449.

Expert.

Discretionary power of a trial judge in both criminal and civil cases in determining as to the qualification of witnesses offered as experts. *Commonwealth v. Phelps*, 109; *Greene v. Corey*, 536.

Testifying as to Conversation in a Foreign Language.

In this Commonwealth a witness in a criminal case may be allowed to state in English the substance of a conversation which he had with the defendant in a foreign language. *Commonwealth v. Shooshanian*, 123.

WORDS.

- "Another officer." See *Beaulieu v. Clark*, 90, 93.
- "Costs." See *Burrage v. County of Bristol*, 299, 300, 301.
- "Debt." See *Powers v. Worcester*, 471, 472, 474.
- "Delivery." See *Gloucester Mutual Fishing Ins. Co. v. Hall*, 332, 334.
- "Expenses." See *Burrage v. County of Bristol*, 299, 300, 301.
- "Framework." See *Selectmen of Natick v. Boston & Albany Railroad*, 229, 232, 233.
- "Printed." See *Blake v. Rogers*, 588, 593, 594.
- "Published." See *Blake v. Rogers*, 588, 593, 594.
- "Relation." See *Worcester Trust Co. v. Turner*, 115, 120.
- "Satisfactory." See *Silver v. Graves*, 26, 29.
- "Surface." See *Selectmen of Natick v. Boston & Albany Railroad*, 229, 232, 233, 234.

WRIT OF ERROR.

See ERROR, WRIT OF.

WRIT OF REVIEW.

See REVIEW, WRIT OF.

YOUNG MEN'S CHRISTIAN ASSOCIATION.

- A corporation called the Young Men's Christian Association of Newburyport was held to be a benevolent or charitable institution within the meaning of those words in St. 1909, c. 490, Part I, § 5, cl. 3, exempting the property of such an institution from taxation, the fact that some of its benefits were afforded only to its members, and a limitation of the privileges of becoming "active" members, of voting and of holding office, not being material. *Little v. Newburyport*, 414.
- A fund, bequeathed for the purpose of paying the net income thereof "for the general purposes" of such a Young Men's Christian Association is exempt from taxation under the provisions of St. 1909, c. 490, Part I, § 5, cl. 3. *Ibid.*

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